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· THE · COLONIAL · PRESS ·
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Liber generationis ihesu xpi
filij dauid: filij abraham.
Abraham genuit ysaac:
ysaac autē genuit iacob.
Iacob aūt genuit iudā et fratres ei9:
iudas aūt genuit phares et zara de
thamar. Phares aūt genuit esrom:
esrom aūt genuit aram. Aram aūt
genuit aminadab: aminadab aūt ge-
nuit naasō. Naason aūt genuit salo-
mon: salomō aūt genuit booz ex raab.
Booz aūt genuit obeth ex ruth: obeth
aūt genuit iesse. Iesse autē genuit da-
uid regē: dauid autē rex genuit salo-
monē ex ea q̄ fuit vrie. Salomō aūt
genuit roboam: roboam aūt genuit
abyam. Abyas aūt genuit asa: asa
aūt genuit iosaphat. Iosaphat aūt
genuit ioram: ioram aūt genuit ozi-
am. Ozias autē genuit ioathan: ioa-
than aūt genuit achar. Achar autē
genuit ezechiam: ezechias aūt genuit
manassen: manasses aūt genuit am-
mon. Ammon aūt genuit iosyam:

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THE SPIRIT OF LAWS

BY

BARON DE MONTESQUIEU
(CHARLES DE SECONDAT)

INCLUDING D'ALEMBERT'S ANALYSIS OF THE WORK

TRANSLATED FROM THE FRENCH BY
THOMAS NUGENT, LL.D.

WITH A SPECIAL INTRODUCTION BY
HON. FREDERIC R. COUDERT, J.U.D., LL.D.

REVISED EDITION

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ILLUSTRATIONS

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SPECIMEN COLUMN OF GUTENBERG'S BIBLE . *Frontispiece*
Fac-simile example of Printing in the Fifteenth Century

THE LAOCOON 80
Photo-engraving from the original marble group

EARLY VENETIAN PRINTING 170
Fac-simile example of a page of Music printed in 1523

THE SPIRIT OF LAWS

BOOK XXIII

OF LAWS IN THE RELATION THEY BEAR TO THE NUMBER OF INHABITANTS

1.—*Of Men and Animals with respect to the Multiplication of their Species*

"Delight of human kind,[a] and gods above;
Parent of Rome, propitious Queen of Love;
* * * * * * * *
For when the rising spring adorns the mead,
And a new scene of nature stands display'd;
When teeming buds, and cheerful greens appear,
And western gales unlock the lazy year;
The joyous birds thy welcome first express,
Whose native songs thy genial fire confess:
Then savage beasts bound o'er their slighted food,
Struck with thy darts, and tempt the raging flood:
All nature is thy gift, earth, air, and sea;
Of all that breathes the various progeny,
Stung with delight, is goaded on by thee.
O'er barren mountains, o'er the flow'ry plain,
The leafy forest, and the liquid main,
Extends thy uncontroll'd and boundless reign.
Thro' all the living regions thou dost move,
And scatter'st where thou go'st the kindly seeds of love."

THE females of brutes have an almost constant fecundity. But in the human species, the manner of thinking, the character, the passions, the humor, the caprice, the idea of preserving beauty, the pain of child-bearing, and the fatigue of a too numerous family, obstruct propagation in a thousand different ways.

[a] Dryden's "Lucrèce."

2.—*Of Marriage*

The natural obligation of the father to provide for his children has established marriage, which makes known the person who ought to fulfil this obligation. The people [b] mentioned by Pomponius Mela [c] had no other way of discovering him but by resemblance.

Among civilized nations, the father is that person on whom the laws, by the ceremony of marriage, have fixed this duty, because they find in him the man they want.[d]

Among brutes this is an obligation which the mother can generally perform; but it is much more extensive among men. Their children indeed have reason; but this comes only by slow degrees. It is not sufficient to nourish them; we must also direct them: they can already live; but they cannot govern themselves.

Illicit conjunctions contribute but little to the propagation of the species. The father, who is under a natural obligation to nourish and educate his children, is not then fixed; and the mother, with whom the obligation remains, finds a thousand obstacles from shame, remorse, and constraint of her sex and the rigor of laws; and besides, she generally wants the means.

Women who have submitted to public prostitution cannot have the convenience of educating their children: the trouble of education is incompatible with their station; and they are so corrupt that they can have no protection from the law.

It follows from all this that public continence is naturally connected with the propagation of the species.

3.—*Of the Condition of Children*

It is a dictate of reason that when there is a marriage, children should follow the station or condition of the father; and that when there is not, they can belong to the mother only.[e]

4.—*Of Families*

It is almost everywhere a custom for the wife to pass into the family of the husband. The contrary is without any inconven-

b The Garamantes.
c Lib. I. cap. viii.
d "Pater est quem nuptiæ demonstrant."
e For this reason, among nations that have slaves, the child almost always follows the station or condition of the mother.

ience established at Formosa,[f] where the husband enters into the family of the wife.

This law, which fixes the family in a succession of persons of the same sex, greatly contributes, independently of the first motives, to the propagation of the human species. The family is a kind of property: a man who has children of a sex which does not perpetuate it is never satisfied if he has not those who can render it perpetual.

Names, whereby men acquire an idea of a thing which one would imagine ought not to perish, are extremely proper to inspire every family with a desire of extending its duration. There are people among whom names distinguish families: there are others where they only distinguish persons: the latter have not the same advantage as the former.

5.—*Of the several Orders of lawful Wives*

Laws and religion sometimes establish many kinds of civil conjunctions; and this is the case among the Mahommedans, where there are several orders of wives, the children of whom are distinguished by being born in the house, by civil contracts, or even by the slavery of the mother, and the subsequent acknowledgment of the father.

It would be contrary to reason that the law should stigmatize the children for what it approved in the father. All these children ought, therefore, to succeed, at least if some particular reason does not oppose it, as in Japan, where none inherit but the children of the wife given by the Emperor. Their policy demands that the gifts of the Emperor should not be too much divided, because they subject them to a kind of service, like that of our ancient fiefs.

There are countries where a wife of the second rank enjoys nearly the same honors in a family as in our part of the world are granted to an only consort: there the children of concubines are deemed to belong to the first or principal wife. Thus it is also established in China. Filial respect,[g] and the ceremony of deep mourning, are not due to the natural mother, but to her appointed by the law.

By means of this fiction they have no bastard children; and where such a fiction does not take place, it is obvious that a law

[f] Du Halde, tom. i. p. 165.

[g] Ibid. tom. ii. p. 129.

to legitimatize the children of concubines must be considered as an act of violence, as the bulk of the nation would be stigmatized by such a decree. Neither is there any regulation in those countries with regard to children born in adultery. The recluse lives of women, the locks, the inclosures, and the eunuchs render all infidelity to their husbands so difficult, that the law judges it impossible. Besides, the same sword would exterminate the mother and the child.

6.—*Of Bastards in different Governments*

They have therefore no such thing as bastards where polygamy is permitted; this disgrace is known only in countries in which a man is allowed to marry but one wife. Here they were obliged to stamp a mark of infamy upon concubinage, and consequently they were under a necessity of stigmatizing the issue of such unlawful conjunctions.

In republics, where it is necessary that there should be the purest morals, bastards ought to be more degraded than in monarchies.

The laws made against them at Rome were perhaps too severe; but as the ancient institutions laid all the citizens under a necessity of marrying, and as marriages were also softened by the permission to repudiate or make a divorce, nothing but an extreme corruption of manners could lead them to concubinage.

It is observable that as the quality of a citizen was a very considerable thing in a democratic government, where it carried with it the sovereign power, they frequently made laws in respect to the state of bastards, which had less relation to the thing itself and to the honesty of marriage than to the particular constitution of the republic. Thus the people have sometimes admitted bastards into the number of citizens, in order to increase their power in opposition to the great.[h] Thus the Athenians exclude bastards from the privilege of being citizens, that they might possess a greater share of the corn sent them by the King of Egypt. In fine, Aristotle informs us that in many cities where there was not a sufficient number of citizens, their bastards succeeded to their possessions; and that when there was a proper number, they did not inherit.[i]

h Aristotle, "Polit." lib. VI. cap. iv. *i* Ibid. lib. III. cap. iii.

7.—*Of the Father's Consent to Marriage*

The consent of fathers is founded on their authority; that is, on the right of property. It is also founded on their love, on their reason, and on the uncertainty of that of their children, whom youth confines in a state of ignorance and passion in a state of ebriety.

In the small republics, or singular institutions already mentioned, they might have laws which gave to magistrates that right of inspection over the marriages of the children of citizens which nature had already given to fathers. The love of the public might there equal or surpass all other love. Thus Plato would have marriages regulated by the magistrates: this the Lacedæmonian magistrates performed.

But in common institutions, fathers have the disposal of their children in marriage: their prudence in this respect is always supposed to be superior to that of a stranger. Nature gives to fathers a desire of procuring successors to their children, when they have almost lost the desire of enjoyment themselves. In the several degrees of progeniture, they see themselves insensibly advancing to a kind of immortality. But what must be done, if oppression and avarice arise to such a height as to usurp all the authority of fathers? Let us hear what Thomas Gage says in regard to the conduct of the Spaniards in the West Indies.[*y*]

"According to the number of the sons and daughters that are marriageable, the father's tribute is raised and increased, until they provide husbands and wives for their sons and daughters, who, as soon as they are married, are charged with tribute; which, that it may increase, they will suffer none above fifteen years of age to live unmarried. Nay, the set time of marriage appointed for the Indians is at fourteen years for the man, and thirteen for the woman; alleging that they are sooner ripe for the fruit of wedlock, and sooner ripe in knowledge and malice, and strength for work and service, than any other people. Nay, sometimes they force those to marry who are scarcely twelve and thirteen years of age, if they find them well-limbed and strong in body, explaining a point of one of the canons, which alloweth fourteen and fifteen years, *Nisi malitia suppleat ætatem.*"

He saw a list of these taken. It was, says he, a most shameful

[*y*] "A New Survey of the West Indies," by Thomas Gage, p. 345, 3d edit.

affair. Thus in an action which ought to be the most free, the Indians are the greatest slaves.

8.—*The same Subject continued*

In England the law is frequently abused by the daughters marrying according to their own fancy without consulting their parents. This custom is, I am apt to imagine, more tolerated there than anywhere else from a consideration that as the laws have not established a monastic celibacy, the daughters have no other state to choose but that of marriage, and this they cannot refuse. In France, on the contrary, young women have always the resource of celibacy; and therefore the law which ordains that they shall wait for the consent of their fathers may be more agreeable. In this light the custom of Italy and Spain must be less rational; convents are there established, and yet they may marry without the consent of their fathers.

9.—*Of young Women*

Young women who are conducted by marriage alone to liberty and pleasure, who have a mind which dares not think, a heart which dares not feel, eyes which dare not see, ears which dare not hear, who appear only to show themselves silly, condemned without intermission to trifles and precepts, have sufficient inducements to lead them on to marriage: it is the young men that want to be encouraged.

10.—*What it is that determines Marriage*

Wherever a place is found in which two persons can live commodiously, there they enter into marriage. Nature has a sufficient propensity to it, when unrestrained by the difficulty of subsistence.

A rising people increase and multiply extremely. This is because with them it would be a great inconvenience to live in celibacy; and none to have many children. The contrary of which is the case when a nation is formed.

11.—*Of the Severity of Government*

Men who have absolutely nothing, such as beggars, have many children. This proceeds from their being in the case of a rising people: it costs the father nothing to give his heart to his

offspring, who even in their infancy are the instruments of this art. These people multiply in a rich or superstitious country, because they do not support the burden of society, but are themselves the burden. But men who are poor, only because they live under a severe government; who regard their fields less as the source of their subsistence than as a cause of vexation; these men, I say, have few children: they have not even subsistence for themselves. How then can they think of dividing it? They are unable to take care of their own persons when they are sick. How then can they attend to the wants of creatures whose infancy is a continual sickness?

It is pretended by some who are apt to talk of things which they have never examined that the greater the poverty of the subjects, the more numerous their families: that the more they are loaded with taxes, the more industriously they endeavor to put themselves in a station in which they will be able to pay them: two sophisms, which have always destroyed and will forever be the destruction of monarchies.

The severity of government may be carried to such an extreme as to make the natural sentiments destructive of the natural sentiments themselves. Would the women of America have refused to bear children had their masters been less cruel? *k*

12.—*Of the Number of Males and Females in different Countries*

I have already observed that there are born in Europe rather more boys than girls.*a* It has been remarked that in Japan there are born rather more girls than boys: *b* all things compared, there must be more fruitful women in Japan than in Europe, and consequently it must be more populous.

We are informed that at Bantam there are ten girls to one boy.*c* A disproportion like this must cause the number of families there to be to the number of those of other climates as 1 to 5½, which is a prodigious difference. Their families may be much larger indeed; but there must be few men in circumstances sufficient to provide for so large a family.

k "A New Survey of the West Indies," by Thomas Gage, p. 97, 3d edit.

a Book XVI. chap. iv.

b See Kempfer, who gives a computation of the people of Meaco.

c "Collection of Voyages that contributed to the establishment of the East India Company," vol. i. p. 347.

13.—*Of Seaport Towns*

In seaport towns, where men expose themselves to a thousand dangers, and go abroad to live or die in distant climates, there are fewer men than women: and yet we see more children there than in other places. This proceeds from the greater ease with which they procure the means of subsistence. Perhaps even the oily parts of fish are more proper to furnish that matter which contributes to generation. This may be one of the causes of the infinite number of people in Japan [d] and China,[e] where they live almost wholly on fish.[f] If this be the case, certain monastic rules, which oblige the monks to live on fish, must be contrary to the spirit of the legislator himself.

14.—*Of the Productions of the Earth which require a greater or less Number of Men*

Pasture-lands are but little peopled, because they find employment only for a few. Corn-lands employ a great many men, and vineyards infinitely more.

It has been a frequent complaint in England,[g] that the increase of pasture-land diminished the inhabitants; and it has been observed in France that the prodigious number of vineyards is one of the great causes of the multitude of people.

Those countries where coal-pits furnish a proper substance for fuel have this advantage over others, that not having the same occasion for forests, the lands may be cultivated.

In countries productive of rice, they are at vast pains in watering the land: a great number of men must therefore be employed. Besides, there is less land required to furnish subsistence for a family than in those which produce other kinds of grain. In fine, the land which is elsewhere employed in raising cattle serves immediately for the subsistence of man; and the labor which in other places is performed by cattle is there performed by men; so that the culture of the soil becomes to man an immense manufacture.

d Japan is composed of a number of isles, where there are many banks, and the sea is there extremely full of fish.

e China abounds in rivers.

f See Du Halde, tom. ii. pp. 139-142.

g The greatest number of the proprietors of land, says Bishop Burnet, finding more profit in selling their wool than their corn, enclosed their estates; the commons, ready to perish with hunger, rose up in arms; they insisted on a division of the lands: the young king even wrote on this subject. And proclamations were made against those who enclosed their lands.—"Abridgment of the History of the Reformation."

15.—*Of the Number of Inhabitants with relation to the Arts*

When there is an agrarian law, and the lands are equally divided, the country may be extremely well peopled, though there are but few arts; because every citizen receives from the cultivation of his land whatever is necessary for his subsistence, and all the citizens together consume all the fruits of the earth. Thus it was in some republics.

In our present situation, in which lands are unequally distributed, they produce much more than those who cultivate them are able to consume; if the arts, therefore, should be neglected, and nothing minded but agriculture, the country could not be peopled. Those who cultivate, or employ others to cultivate, having corn to spare, nothing would engage them to work the following year; the fruits of the earth would not be consumed by the indolent; for these would have nothing with which they could purchase them. It is necessary, then, that the arts should be established, in order that the produce of the land may be consumed by the laborer and the artificer. In a word, it is now proper that many should cultivate much more than is necessary for their own use. For this purpose they must have a desire of enjoying superfluities; and these they can receive only from the artificer.

The machines designed to abridge art are not always useful. If a piece of workmanship is of a moderate price, such as is equally agreeable to the maker and the buyer, those machines which would render the manufacture more simple, or, in other words, diminish the number of workmen, would be pernicious. And if water-mills were not everywhere established, I should not have believed them so useful as is pretended, because they have deprived an infinite multitude of their employment, a vast number of persons of the use of water, and great part of the land of its fertility.

16.—*The Concern of the Legislator in the Propagation of the Species*

Regulations on the number of citizens depend greatly on circumstances. There are countries in which nature does all; the legislator then has nothing to do. What need is there of inducing men by laws to propagation when a fruitful climate yields a

sufficient number of inhabitants? Sometimes the climate is more favorable than the soil; the people multiply, and are destroyed by famine: this is the case of China. Hence a father sells his daughters and exposes his children. In Tonquin,[h] the same causes produce the same effects; so we need not, like the Arabian travellers mentioned by Renaudot, search for the origin of this in their sentiments on the metempsychosis.[i]

For the same reason, the religion of the isle of Formosa does not suffer the women to bring their children into the world till they are thirty-five years of age:[j] the priestess, before this age, by bruising the belly procures abortion.

17.—*Of Greece and the Number of its Inhabitants*

That effect which in certain countries of the East springs from physical causes was produced in Greece by the nature of the government. The Greeks were a great nation, composed of cities, each of which had a distinct government and separate laws. They had no more the spirit of conquest and ambition than those of Switzerland, Holland, and Germany have at this day. In every republic the legislator had in view the happiness of the citizens at home, and their power abroad, lest it should prove inferior to that of the neighboring cities.[k] Thus, with the enjoyment of a small territory and great happiness, it was easy for the number of the citizens to increase to such a degree as to become burdensome. This obliged them incessantly to send out colonies,[l] and, as the Swiss do now, to let their men out to war. Nothing was neglected that could hinder the too great multiplication of children.

They had among them republics, whose constitution was very remarkable. The nations they had subdued were obliged to provide subsistence for the citizens. The Lacedæmonians were fed by the Helotes, the Cretans by the Periecians, and the Thessalians by the Penestes. They were obliged to have only a certain number of freemen, that their slaves might be able to furnish them with subsistence. It is a received maxim nowadays that it is necessary to limit the number of regular troops: now

h Dampier's "Voyages," vol. ii. p. 41.
i Ibid. p. 167.
j See the "Collection of Voyages that contributed to the establishment of the East India Company," vol. i. part I. pp. 182, 188.
k In valor, discipline, and military exercises.
l The Gauls, who were in the same circumstances, acted in the same manner.

the Lacedæmonians were an army maintained by the peasants: it was proper, therefore, that this army should be limited; without this the freemen, who had all the advantages of society, would increase beyond number, and the laborers be overloaded.

The politics of the Greeks were particularly employed in regulating the number of citizens. Plato fixes them at five thousand and forty,[m] and he would have them stop or encourage propagation, as was most convenient, by honors, shame, and the advice of the old men; he would even regulate the number of marriages in such a manner that the republic might be recruited without being overcharged.[n]

If the laws of a country, says Aristotle, forbid the exposing of children, the number of those brought forth ought to be limited.[o] If they have more than the number prescribed by law, he advises to make the women miscarry before the fetus be formed.[p]

The same author mentions the infamous means made use of by the Cretans to prevent their having too great a number of children—a proceeding too indecent to repeat.

There are places, says Aristotle again,[q] where the laws give the privilege of being citizens to strangers, or to bastards, or to those whose mothers only are citizens; but as soon as they have a sufficient number of people this privilege ceases. The savages of Canada burn their prisoners; but when they have empty cottages to give them, they receive them into their nation.

Sir William Petty, in his calculations, supposes that a man in England is worth what he would sell for at Algiers.[r] This can be true only with respect to England. There are countries where a man is worth nothing; there are others where he is worth less than nothing.

18.—*Of the State and Number of People before the Romans*

Italy, Sicily, Asia Minor, Gaul, and Germany were nearly in the same state as Greece; full of small nations that abounded with inhabitants, they had no need of laws to increase their number.

19.—*Of the Depopulation of the Globe*

All these little republics were swallowed up in a large one, and the globe insensibly became depopulated: in order to be

m "Repub." lib. V.
n Ibid.
o "Polit." lib. VII. cap. xvi.
p Ibid.
q Ibid. lib. III. cap. iii.
r Sixty pounds sterling.

convinced of this, we need only consider the state of Italy and Greece before and after the victories of the Romans.

"You will ask me," says Livy,[s] "where the Volsci could find soldiers to support the war, after having been so often defeated. There must have been formerly an infinite number of people in those countries, which at present would be little better than a desert, were it not for a few soldiers and Roman slaves."

"The Oracles have ceased," says Plutarch, "because the places where they spoke are destroyed. At present we can scarcely find in Greece three thousand men fit to bear arms."

"I shall not describe," says Strabo,[t] "Epirus and the adjacent places, because these countries are entirely deserted. This depopulation, which began long ago, still continues; so that the Roman soldiers encamp in the houses they have abandoned." We find the cause of this in Polybius, who says that Paulus Æmilius, after his victory, destroyed seventy cities of Epirus, and carried away a hundred and fifty thousand slaves.

20.—*That the Romans were under the Necessity of making Laws to encourage the Propagation of the Species*

The Romans, by destroying others, were themselves destroyed: incessantly in action, in the heat of battle, and in the most violent attempts, they wore out like a weapon kept constantly in use.

I shall not here speak of the attention with which they applied themselves to procure citizens in the room of those they lost,[u] of the associations they entered into, the privileges they bestowed, and of that immense nursery of citizens, their slaves. I shall mention what they did to recruit the number, not of their citizens, but of their men; and as these were the people in the would who knew best how to adapt their laws to their projects, an examination of their conduct in this respect cannot be a matter of indifference.

21.—*Of the Laws of the Romans relating to the Propagation of the Species*

The ancient laws of Rome endeavored greatly to incite the citizens to marriage. The Senate and the people made frequent

[s] Lib. VI.
[t] Lib. VII. p. 496.
[u] I have treated of this in the "Considerations on the Causes of the Rise and Declension of the Roman Grandeur."

regulations on this subject, as Augustus says in his speech related by Dio.[v]

Dionysius Halicarnassus[w] cannot believe that after the death of three hundred and five of the Fabii, exterminated by the Veientes, there remained no more of this family than one single child; because the ancient law, which obliged every citizen to marry and to educate all his children, was still in force.[x]

Independently of the laws, the Censors had a particular eye upon marriages, and according to the exigencies of the republic engaged them to it by shame and by punishments.[y]

The corruption of manners that began to take place contributed vastly to disgust the citizens with marriage, which was painful to those who had no taste for the pleasures of innocence. This is the purport of that speech which Metellus Numidicus, when he was censor, made to the people:[z] "If it were possible for us to do without wives, we should deliver ourselves from this evil: but as nature has ordained that we cannot live very happily with them, nor subsist without them, we ought to have more regard to our own preservation than to transient gratifications."

The corruption of manners destroyed the censorship, which was itself established to destroy the corruption of manners: for when this depravation became general, the Censor lost his power.[a]

Civil discords, triumvirates, and proscriptions weakened Rome more than any war she had hitherto engaged in. They left but few citizens,[b] and the greatest part of them unmarried. To remedy this last evil, Cæsar and Augustus re-established the censorship, and would even be censors themselves.[c] Cæsar gave rewards to those who had many children.[d] All women under forty-five years of age who had neither husband nor children were forbidden to wear jewels or to ride in litters;[e] an excellent method thus to attack celibacy by the power of vanity. The laws of Augustus were more pressing:[f] he imposed new penalties on such

[v] Lib. LVI.

[w] Lib. II.

[x] In the year of Rome 277.

[y] See what was done in this respect in T. Livy, lib. XLV.; the "Epitome" of T. Livy, lib. LIX.; Aulus Gellius, lib. I. cap. vi.; Valerius Maximus, lib. II. cap. xix.

[z] It is in Aulus Gellius, lib. I. cap. vi.

[a] See what I have said in book V. chap. xix.

[b] Cæsar, after the Civil War, having made a survey of the Roman citizens, found there were no more than one hundred and fifty thousand heads of families.—Florus's "Epitome of Livy," 17th decad.

[c] See Dio, lib. XLIII., and Xiphilinus in "August."

[d] Dio, lib. XLIII.; Suetonius, "Life of Cæsar," chap. xx.; Appian, lib. II. of the "Civil War."

[e] Eusebius, in his "Chronicle."

[f] Dio, lib. LIV.

as were not married,[g] and increased the rewards both of those who were married and of those who had children. Tacitus calls these Julian laws;[h] to all appearance they were founded on the ancient regulations made by the Senate, the people, and the Censors.

The law of Augustus met with innumerable obstacles, and thirty-four years after it had been made the Roman knights insisted on its being abolished.[i] He placed on one side such as were married, and on the other side those who were not: these last appeared by far the greatest number; upon which the citizens were astonished and confounded. Augustus, with the gravity of the ancient censors, addressed them in this manner:—[j]

"While sickness and war snatch away so many citizens, what must become of this state if marriages are no longer contracted? The city does not consist of houses, of porticos, of public places, but of inhabitants. You do not see men like those mentioned in Fable starting out of the earth to take care of your affairs. Your celibacy is not owing to the desire of living alone; for none of you eats or sleeps by himself. You only seek to enjoy irregularities undisturbed. Do you cite the example of the Vestal Virgins? If you preserve not the laws of chastity, you ought to be punished like them. You are equally bad citizens, whether your example has an influence on the rest of the world, or whether it be disregarded. My only view is the perpetuity of the republic. I have increased the penalties of those who have disobeyed; and with respect to rewards, they are such as I do not know whether virtue has ever received greater. For less will a thousand men expose life itself; and yet will not these engage you to take a wife and provide for children?"

He made a law, which was called after his name, Julia and Papia Poppæa, from the names of the Consuls for part of that year.[k] The greatness of the evil appeared even in their being elected: Dio tells us that they were not married, and that they had no children.[l]

This decree of Augustus was properly a code of laws, and a systematic body of all the regulations that could be made on this

[g] In the year of Rome 736.
[h] "Julias rogationes."—"Annal." lib. III.
[i] In the year of Rome 762.—Dio, lib. LVI.
[j] I have abridged this speech, which is of tedious length; it is to be found in Dio, lib. LVI.
[k] Marcus Papius Mutilus and Q. Poppæus Sabinus.—Dio, lib. LVI.
[l] Ibid.

subject. The Julian laws were incorporated in it, and received greater strength.[m] It was so extensive in its use, and had an influence on so many things, that it formed the finest part of the civil law of the Romans.

We find parts of it dispersed in the precious fragments of Ulpian,[n] in the Laws of the Digest, collected from authors who wrote on the Papian laws, in the historians and others who have cited them, in the Theodosian code which abolished them, and in the works of the fathers, who have censured them, without doubt from a laudable zeal for the things of the other life, but with very little knowledge of the affairs of this.

These laws had many heads,[o] of which we know thirty-five. But to return to my subject as speedily as possible, I shall begin with that head which Aulus Gellius informs us was the seventh, and relates to the honors and rewards granted by that law.[p]

The Romans, who for the most part sprang from the cities of the Latins, which were Lacedæmonian colonies,[q] and had received a part of their laws even from those cities,[r] had, like the Lacedæmonians, such veneration for old age as to give it all honor and precedence. When the republic wanted citizens, she granted to marriage and to a number of children the privileges which had been given to age.[s] She granted some to marriage alone, independently of the children which might spring from it: this was called the right of husbands. She gave others to those who had any children, and larger still to those who had three children. These three things must not be confounded. These last had those privileges which married men constantly enjoyed; as, for example, a particular place in the theatre;[t] they had those which could only be enjoyed by men who had children, and which none could deprive them of but such as had a greater number.

These privileges were very extensive. The married men who had the most children were always preferred, whether in the pursuit or in the exercise of honors.[u] The Consul who had the most

[m] The 14th title of the "Fragments of Ulpian" distinguishes very rightly between the Julian and the Papian law.

[n] James Godfrey has made a collection of these.

[o] The 35th is cited in the 19th law ff. "de ritu nuptiarum."

[p] Lib. II. cap. xv.

[q] Dionysius Halicarnassus.

[r] The deputies of Rome, who were sent to search into the laws of Greece, went to Athens, and to the cities of Italy.

[s] Aulus Gellius, lib. II. cap. xv.

[t] Suetonius, in "Augusto," cap. xliv.

[u] Tacitus, lib. II.: "Ut numerus liberorum in candidatis præpolleret, quod lex jubebat."

numerous offspring was the first who received the fasces;[v] he had his choice of the provinces: [w] the Senator who had most children had his name written first in the catalogue of Senators, and was the first in giving his opinion in the Senate.[x] They might even stand sooner than ordinary for an office, because every child gave a dispensation of a year.[y] If an inhabitant of Rome had three children, he was exempted from all troublesome offices.[z] The free-born women who had three children, and the freedwomen who had four, passed out of that perpetual tutelage [a] in which they had been held by the ancient laws of Rome.[b]

As they had rewards, they had also penalties.[c] Those who were not married could receive no advantage from the will of any person that was not a relative; [d] and those who, being married, had no children, could receive only half.[e] The Romans, says Plutarch, marry only to be heirs, and not to have them.[f]

The advantages which a man and his wife might receive from each other by will were limited by law.[g] If they had children of each other, they might receive the whole; if not, they could receive only a tenth part of the succession on the account of marriage; and if they had any children by a former venter, as many tenths as they had children.

If a husband absented himself from his wife on any other cause than the affairs of the republic, he could not inherit from her.[h]

The law gave to a surviving husband or wife two years to marry again,[i] and a year and a half in case of a divorce. The fathers who would not suffer their children to marry, or refused to give their daughters a portion, were obliged to do it by the magistrates.[j]

They were not allowed to betroth, when the marriage was to

v Aulus Gellius, lib. II. cap. xv.

w Tacitus, "Annal." lib. XV.

x See Law 6, sec. 5, "de Decurion."

y See Law 2 ff. "de minorib."

z Law 1st and 2d ff. "de vacatione et excusat. munerum."

a "Frag. of Ulpian," tit. 29, sec. 3.

b Plutarch, "Life of Numa."

c See the "Fragments of Ulpian," tit. 14, 15, 16, 17, and 18, which compose one of the most valuable pieces of the ancient civil law of the Romans.

d Sozom. lib. I. cap. ix. They could receive from their relatives.—"Frag. of Ulpian," tit. 16, sec. 1.

e Ibid.; and leg. unic. cod. Theod. "de Infirm. pœnis cælib. et orbit."

f "Moral Works," "Of the love of Fathers towards their Children."

g See a more particular account of this in the "Frag. of Ulpian," tit. 15 and 16.

h Ibid. tit. 16, sec. 1.

i Ibid. tit. 14. It seems the first Julian laws allowed three years.—"Speech of Augustus," in Dio, lib. LVI.; Suetonius, "Life of Augustus," cap. xxxiv. Other Julian laws granted but one year: the Papian law gave two.—"Frag. of Ulpian," tit. 14. These laws were not agreeable to the people; Augustus, therefore, softened or strengthened them as they were more or less disposed to comply with them.

j This was the 35th head of the Papian law.—Leg. 19 ff. "de ritu nuptiarum."

be deferred for more than two years:[k] and as they could not marry a girl till she was twelve years old, they could not be betrothed to her till she was ten. The law would not suffer them to trifle to no purpose;[l] and under a pretence of being betrothed, to enjoy the privileges of married men.

It was contrary to law for a man of sixty to marry a woman of fifty.[m] As they had given great privileges to married men, the law would not suffer them to enter into useless marriages. For the same reason, the Calvisian *senatus-consultum* declared the marriage of a woman above fifty with a man less than sixty to be unequal:[n] so that a woman of fifty years of age could not marry without incurring the penalties of these laws. Tiberius added to the rigor of the Papian law,[o] and prohibited men of sixty from marrying women under fifty; so that a man of sixty could not marry in any case whatsoever, without incurring the penalty. But Claudius abrogated this law made under Tiberius.[p]

All these regulations were more conformable to the climate of Italy than to that of the North, where a man of sixty years of age has still a considerable degree of strength, and where women of fifty are not always past child-bearing.

That they might not be unnecessarily limited in the choice they were to make, Augustus permitted all the free-born citizens who were not senators[q] to marry freed-women.[r] The Papian law forbade the Senators marrying freed-women,[s] or those who had been brought up to the stage; and from the time of Ulpian,[t] free-born persons were forbidden to marry women who had led a disorderly life, who had played in the theatre, or who had been condemned by a public sentence. This must have been established by a decree of the Senate. During the time of the republic they had never made laws like these, because the Censors corrected this kind of disorders as soon as they arose, or else prevented their rising.

Constantine made a law[u] in which he comprehended, in the prohibition of the Papian law, not only the Senators, but even

k See Dio, lib. LIV., anno 736; Suetonius, in "Octavio," cap. xxxiv.

l Dio, lib. LIV.; and in the same Dio, the "Speech of Augustus," lib. LVI.

m "Frag. of Ulpian," tit. 16, and the 27th law. cod. "de nuptiis."

n Ibid. tit. 16, sec. 3.

o See Suetonius in "Claudio," cap. xxiii.

p Ibid. "Life of Claudius," cap. xxiii., and the "Frag. of Ulpian," tit. 16, sec. 3.

q Dio, lib. LIV.; "Frag. of Ulpian," tit. 13.

r "Augustus's speech," in Dio, lib. LVI.

s "Frag. of Ulpian," cap. xiii., and the 44th law ff. "de ritu nuptiarum."

t Ibid. tit. 13 and 16.

u See Law 1, in cod. "de natur. lib."

such as had a considerable rank in the state, without mentioning persons in an inferior station: this constituted the law of those times. These marriages were therefore no longer forbidden, except to the free-born comprehended in the law of Constantine. Justinian, however, abrogated the law of Constantine,[v] and permitted all sorts of persons to contract these marriages; and thus we have acquired so fatal a liberty.

It is evident that the penalties inflicted on such as married contrary to the prohibition of the law were the same as those inflicted on persons who did not marry. These marriages did not give them any civil advantage; [w] for the dowry [x] was confiscated after the death of the wife.[y]

Augustus having adjudged the succession and legacies of those whom these laws had declared incapable to the public treasury,[z] they had the appearance rather of fiscal than of political and civil laws. The disgust they had already conceived at a burden which appeared too heavy was increased by their seeing themselves a continual prey to the avidity of the treasury. On this account, it became necessary, under Tiberius, that these laws should be softened; [a] that Nero should lessen the rewards given out of the treasury to the informers; [b] that Trajan should put a stop to their plundering; [c] that Severus should also moderate these laws; [d] and that the civilians should consider them as odious, and in all their decisions deviate from the literal rigor.

Besides, the emperors enervated these laws [e] by the privileges they granted of the rights of husbands, of children, and of three children. More than this, they gave particular persons a dispensation from the penalties of these laws.[f] But the regulations established for the public utility seemed incapable of admitting an alleviation.

It was highly reasonable that they should grant the rights of

v "Novell." 177.

w Law 37 ff. "de operib. libertorum," sec. 7; "Frag. of Ulpian," tit. 16. sec. 2.

x Frag. of Ulpian," tit. 16, sec. 2.

y See book XXVI. chap. xiii.

z Except in certain cases. See the "Frag. of Ulpian," tit. 18, and the only law in cod. "de Caduc. tollend."

a "Relatum de moderanda Papiâ Poppæâ."—Tacit. "Annal." lib. III. p. 117.

b He reduced them to the fourth part. —Suetonius, in "Nerone," cap. x.

c See Pliny's "Panegyric."

d Severus extended even to twenty-five years for the males, and to twenty for the females, the time fixed by the Papian law, as we see by comparing the "Frag. of Ulpian," tit. 16, with what Tertullian says, "Apol." cap. iv.

e P. Scipio, the Censor, complains, in his speech to the people, of the abuses which were already introduced, that they received the same privileges for adopted as for natural children.—Aulus Gellius, lib. V. cap. xix.

f See the 31st law ff. "de ritu nuptiarum."

children to the vestals,[g] whom religion retained in a necessary virginity; they gave, in the same manner, the privilege of married men to soldiers,[h] because they could not marry. It was customary to exempt the emperors from the constraint of certain civil laws. Thus Augustus was freed from the constraint of the law which limited the power of enfranchising,[i] and of that which set bounds to the right of bequeathing by testament.[j] These were only particular cases; but, at last, dispensations were given without discretion, and the rule itself became no more than an exception.

The sects of philosophers had already introduced in the empire a disposition that estranged them from business—a disposition which could not gain ground in the time of the republic,[k] when everybody was employed in the arts of war and peace. Hence arose an idea of perfection, as connected with a life of speculation; hence an estrangement from the cares and embarrassments of a family. The Christian religion coming after this philosophy fixed, if I may make use of the expression, the ideas which that had only prepared.

Christianity stamped its character on jurisprudence; for empire has ever a connection with the priesthood. This is visible from the Theodosian code, which is only a collection of the decrees of the Christian emperors.

A panegyrist of Constantine[l] said to that emperor, "Your laws were made only to correct vice and to regulate manners: you have stripped the ancient laws of that artifice which seemed to have no other aim than to lay snares for simplicity."

It is certain that the alterations made by Constantine took their rise either from sentiments relating to the establishment of Christianity, or from ideas conceived of its perfection. From the first proceeded those laws which gave such authority to bishops, and which have been the foundation of the ecclesiastical jurisdiction; hence those laws which weakened paternal authority,[m] by depriving the father of his property in the possessions of his children.

g Augustus in the Papian law gave them the privilege of mothers. See Dio, lib. LXVI. Numa had granted them the ancient privilege of women who had three children; that is, of having no guardian.—Plutarch, "Life of Numa."

h This was granted them by Claudius.—Dio, lib. LX.

i Leg. apud eum, ff. "de manumissionib." sec. 1.

j Dio, lib. LV.

k See, in Cicero's "Offices," his sentiments on the spirit of speculation.

l Nazarius, "in panegyrico Constantini," anno 321.

m See Laws 1, 2, 3, in the Theodosian code "de bonis maternis," "maternique generis," etc., and the only law in the same code, "de bonis quæ filius famil. acquiruntur."

To extend a new religion, they were obliged to take away the dependence of children, who are always least attached to what is already established.

The laws made with a view to Christian perfection were more particularly those by which the penalties of the Papian laws were abolished;[n] the unmarried were equally exempted from them, with those who, being married, had no children.

"These laws were established," says an ecclesiastical historian,[o] "as if the multiplication of the human species was an effect of our care; instead of being sensible that the number is increased or diminished, according to the order of Providence."

Principles of religion have had an extraordinary influence on the propagation of the human species. Sometimes they have promoted it, as among the Jews, the Mahommedans, the Gaurs, and the Chinese; at others they have put a damp to it, as was the case of the Romans upon their conversion to Christianity.

They everywhere incessantly preached continency; a virtue the more perfect because in its own nature it can be practised but by very few.

Constantine had not taken away the decimal laws which granted a greater extent to the donations between man and wife, in proportion to the number of their children. Theodosius, the younger, abrogated even these laws.[p]

Justinian declared all those marriages valid which had been prohibited by the Papian laws.[q] These laws require people to marry again: Justinian granted privileges to those who did not marry again.[r]

By the ancient institutions, the natural right which everyone had to marry and beget children could not be taken away. Thus when they received a legacy,[s] on condition of not marrying, or when a patron made his freed-man swear [t] that he would neither marry nor beget children, the Papian law annulled both the condition and the oath.[u] The clauses on continuing in widowhood established among us contradict the ancient law, and descend from the constitutions of the emperors, founded on ideas of perfection.

n Leg. unic. cod. Theod. "de Infirm. pœn. cælib. et orbit."
o Sozomenus, p. 27.
p Leg. 2 and 3, cod. Theod. "de jur. liber."
q Leg. Sancimus, cod. "de nuptiis."
r "Novell." 127, cap. iii.; "Novell." 118, cap. v.
s Leg. 54 ff. "de condit. et demonst."
t Leg. 5, sec. 4, "de jure patronatus."
u Paul, in his "Sentences," lib. III. tit. 4, sec. 15.

There is no law that contains an express abrogation of the privileges and honors which the Romans had granted to marriages, and to a number of children. But where celibacy had the pre-eminence, marriage could not be held in honor; and since they could oblige the officers of the public revenue to renounce so many advantages by the abolition of the penalties, it is easy to perceive that with yet greater ease they might put a stop to the rewards.

The same spiritual reason which had permitted celibacy soon imposed it even as necessary. God forbid that I should here speak against celibacy as adopted by religion; but who can be silent, when it is built on libertinism: when the two sexes, corrupting each other even by the natural sensations themselves, fly from a union which ought to make them better, to live in that which always renders them worse?

It is a rule drawn from nature, that the more the number of marriages is diminished, the more corrupt are those who have entered into that state; the fewer married men, the less fidelity is there in marriage; as when there are more thieves, more thefts are committed.

22.—Of the Exposing of Children

The Roman policy was very good in respect to the exposing of children. Romulus, says Dionysius Halicarnassus,[v] laid the citizens under an obligation to educate all their male children, and the eldest of their daughters. If the infants were deformed and monstrous, he permitted the exposing them, after having shown them to five of their nearest neighbors.

Romulus did not suffer them to kill any infants under three years old:[w] by which means he reconciled the law that gave to fathers the right over their children of life and death with that which prohibited their being exposed.

We find also in Dionysius Halicarnassus[x] that the law which obliged the citizens to marry, and to educate all their children, was in force in the 277th year of Rome; we see that custom had restrained the law of Romulus which permitted them to expose their younger daughters.

We have no knowledge of what the law of the Twelve Tables (made in the year of Rome 301) appointed with respect to the ex-

[v] "Antiquities of Rome," lib. II. [w] Ibid. [x] Lib. IX.

posing of children, except from a passage of Cicero,[y] who, speaking of the office of tribune of the people, says that soon after its birth, like the monstrous infant of the law of the Twelve Tables, it was stifled; the infant that was not monstrous was therefore preserved, and the law of the Twelve Tables made no alteration in the preceding institutions.

"The Germans," says Tacitus,[z] "never expose their children; among them the best manners have more force than in other places the best laws." The Romans had therefore laws against this custom, and yet they did not follow them. We find no Roman law that permitted the exposing of children;[a] this was, without doubt, an abuse introduced towards the decline of the republic, when luxury robbed them of their freedom, when wealth divided was called poverty, when the father believed that all was lost which he gave to his family, and when this family was distinct from his property.

23.—*Of the State of the World after the Destruction of the Romans*

The regulations made by the Romans to increase the number of their citizens had their effect while the republic in the full vigor of her constitution had nothing to repair but the losses she sustained by her courage, by her intrepidity, by her firmness, her love of glory and of virtue. But soon the wisest laws could not re-establish what a dying republic, what a general anarchy, what a military government, what a rigid empire, what a proud despotic power, what a feeble monarchy, what a stupid, weak, and superstitious court had successively pulled down. It might, indeed, be said that they conquered the world only to weaken it, and to deliver it up defenceless to barbarians. The Gothic nations, the Getes, the Saracens and Tartars by turns harassed them; and soon the barbarians had none to destroy but barbarians. Thus, in fabulous times, after the inundations and the deluge, there arose out of the earth armed men, who exterminated one another.

y Lib. III. "de legib."
z "De Moribus Germanorum."
a There is no title on this subject in the Digest; the title of the Code says nothing of it, any more than the "Novels."

24.—*The Changes which happened in Europe with regard to the Number of the Inhabitants*

In the state Europe was in one would not imagine it possible for it to be retrieved, especially when under Charlemagne it formed only one vast empire. But by the nature of government at that time it became divided into an infinite number of petty sovereignties, and as the lord or sovereign, who resided in his village or city, was neither great, rich, powerful, nor even safe but by the number of his subjects, everyone employed himself with a singular attention to make his little country flourish. This succeeded in such a manner that notwithstanding the irregularities of government, the want of that knowledge which has since been acquired in commerce, and the numerous wars and disorders incessantly arising, most countries of Europe were better peopled in those days than they are even at present.

I have not time to treat fully of this subject, but I shall cite the prodigious armies engaged in the crusades, composed of men of all countries. Puffendorf says that in the reign of Charles IX there were in France twenty millions of men.[b]

It is the perpetual reunion of many little states that has produced this diminution. Formerly, every village of France was a capital; there is at present only one large one. Every part of the state was a centre of power; at present all has a relation to one centre, and this centre is in some measure the state itself.

25.—*The same Subject continued*

Europe, it is true, has for these two ages past greatly increased its navigation; this has both procured and deprived it of inhabitants. Holland sends every year a great number of mariners to the Indies, of whom not above two-thirds return; the rest either perish or settle in the Indies. The same thing must happen to every other nation concerned in that trade.

We must not judge of Europe as of a particular state engaged alone in an extensive navigation. This state would increase in people, because all the neighboring nations would endeavor to have a share in this commerce, and mariners would arrive from

[b] "Introduction to the History of Europe," chap. v. of France. This is obviously a numerical blunder, since, according to the Census of 1751, and France was never so populous as at that time, she did not possess twenty millions.—Voltaire.

all parts. Europe, separated from the rest of the world by religion,[c] by vast seas and deserts, cannot be repaired in this manner.

26.—*Consequences*

From all this we may conclude that Europe is at present in a condition to require laws to be made in favor of the propagation of the human species. The politics of the ancient Greeks incessantly complain of the inconveniences attending a republic, from the excessive number of citizens; but the politics of this age call upon us to take proper means to increase ours.

27.—*Of the Law made in France to encourage the Propagation of the Species*

Louis XIV appointed particular pensions to those who had ten children, and much larger to such as had twelve.[d] But it is not sufficient to reward prodigies. In order to communicate a general spirit, which leads to the propagation of the species, it is necessary for us to establish, like the Romans, general rewards, or general penalties.

28.—*By what Means we may remedy a Depopulation*

When a state is depopulated by particular accidents, by wars, pestilence, or famine, there are still resources left. The men who remain may preserve the spirit of industry; they may seek to repair their misfortunes, and calamity itself may make them become more industrious. This evil is almost incurable when the depopulation is prepared beforehand by interior vice and a bad government. When this is the case, men perish with an insensible and habitual disease; born in misery and weakness, in violence or under the influence of a wicked administration, they see themselves destroyed, and frequently without perceiving the cause of their destruction. Of this we have a melancholy proof in the countries desolated by despotic power, or by the excessive advantages of the clergy over the laity.

In vain shall we wait for the succor of children yet unborn to re-establish a state thus depopulated. There is not time for this; men in their solitude are without courage or industry. With land sufficient to nourish a nation, they have scarcely enough to

[c] Mahommedan countries surround it almost on every side.

[d] The edict of 1666 in favor of marriages.

nourish a family. The common people have not even a property in the miseries of the country, that is, in the fallows with which it abounds. The clergy, the prince, the cities, the great men, and some of the principal citizens insensibly become proprietors of all the land which lies uncultivated; the families who are ruined have left their fields, and the laboring man is destitute.

In this situation they should take the same measures throughout the whole extent of the empire which the Romans took in a part of theirs; they should practise in their distress what these observed in the midst of plenty; that is, they should distribute land to all the families who are in want, and procure them materials for clearing and cultivating it. This distribution ought to be continued so long as there is a man to receive it, and in such a manner as not to lose a moment that can be industriously employed.

29.—*Of Hospitals*

A man is not poor because he has nothing, but because he does not work. The man who without any degree of wealth has an employment is as much at his ease as he who without labor has an income of a hundred crowns a year. He who has no substance, and yet has a trade, is not poorer than he who, possessing ten acres of land, is obliged to cultivate it for his subsistence. The mechanic who gives his art as an inheritance to his children has left them a fortune, which is multiplied in proportion to their number. It is not so with him who, having ten acres of land, divides it among his children.

In trading countries, where many men have no other subsistence but from the arts, the state is frequently obliged to supply the necessities of the aged, the sick, and the orphan. A well-regulated government draws this support from the arts themselves. It gives to some such employment as they are capable of performing; others are taught to work, and this teaching of itself becomes an employment.

The alms given to a naked man in the street do not fulfil the obligations of the state, which owes to every citizen a certain subsistence, a proper nourishment, convenient clothing, and a kind of life not incompatible with health.

Aurengzebe, being asked why he did not build hospitals, said, "I will make my empire so rich that there shall be no need of

hospitals." [e] He ought to have said, I will begin by rendering my empire rich, and then I will build hospitals.

The riches of the state suppose great industry. Amidst the numerous branches of trade it is impossible but that some must suffer, and consequently the mechanics must be in a momentary necessity.

Whenever this happens, the state is obliged to lend them a ready assistance, whether it be to prevent the sufferings of the people, or to avoid a rebellion. In this case hospitals, or some equivalent regulations, are necessary to prevent this misery.

But when the nation is poor, private poverty springs from the general calamity, and is, if I may so express myself, the general calamity itself. All the hospitals in the world cannot cure this private poverty; on the contrary, the spirit of indolence, which it constantly inspires, increases the general and consequently the private misery.

Henry VIII,[f] resolving to reform the Church of England, ruined the monks, of themselves a lazy set of people, that encouraged laziness in others, because, as they practised hospitality, an infinite number of idle persons, gentlemen and citizens, spent their lives in running from convent to convent. He demolished even the hospitals, in which the lower people found subsistence, as the gentlemen did theirs in the monasteries. Since these changes, the spirit of trade and industry has been established in England.

At Rome, the hospitals place everyone at his ease except those who labor, except those who are industrious, except those who have land, except those who are engaged in trade.

I have observed that wealthy nations have need of hospitals, because fortune subjects them to a thousand accidents; but it is plain that transient assistances are much better than perpetual foundations. The evil is momentary; it is necessary, therefore, that the succor should be of the same nature, and that it be applied to particular accidents.

[e] See Sir John Chardin's "Travels through Persia," vol. viii.

[f] See Burnet's "History of the Reformation."

BOOK XXIV

OF LAWS IN RELATION TO RELIGION CONSIDERED IN ITSELF, AND IN ITS DOCTRINES

1.—*Of Religion in General*

AS amidst several degrees of darkness we may form a judgment of those which are the least thick, and among precipices which are the least deep, so we may search among false religions for those that are most conformable to the welfare of society; for those which, though they have not the effect of leading men to the felicity of another life, may contribute most to their happiness in this.

I shall examine, therefore, the several religions of the world, in relation only to the good they produce in civil society, whether I speak of that which has its root in heaven, or of those which spring from the earth.

As in this work I am not a divine but a political writer, I may here advance things which are not otherwise true, than as they correspond with a worldly manner of thinking, not as considered in their relation to truths of a more sublime nature.

With regard to the true religion, a person of the least degree of impartiality must see that I have never pretended to make its interests submit to those of a political nature, but rather to unite them; now, in order to unite, it is necessary that we should know them.

The Christian religion, which ordains that men should love each other, would, without doubt, have every nation blest with the best civil, the best political laws; because these, next to this religion, are the greatest good that men can give and receive.

2.—*A Paradox of Mr. Bayle's*

Mr. Bayle has pretended to prove[a] that it is better to be an atheist than an idolater; that is, in other words, that it is less

[a] "Thoughts on the Comet."

dangerous to have no religion at all than a bad one. "I had rather," said he, "it should be said of me that I had no existence than that I am a villain." This is only a sophism founded on this, that it is of no importance to the human race to believe that a certain man exists, whereas it is extremely useful for them to believe the existence of a God. From the idea of his non-existence immediately follows that of our independence; or, if we cannot conceive this idea, that of disobedience. To say that religion is not a restraining motive, because it does not always restrain, is equally absurd as to say that the civil laws are not a restraining motive. It is a false way of reasoning against religion to collect, in a large work, a long detail of the evils it has produced, if we do not give at the same time an enumeration of the advantages which have flowed from it. Were I to relate all the evils that have arisen in the world from civil laws, from monarchy, and from republican government, I might tell of frightful things. Were it of no advantage for subjects to have religion, it would still be of some, if princes had it, and if they whitened with foam the only rein which can restrain those who fear not human laws.

A prince who loves and fears religion is a lion, who stoops to the hand that strokes, or to the voice that appeases him. He who fears and hates religion is like the savage beast that growls and bites the chain which prevents his flying on those who come near him. He who has no religion at all is that terrible animal who perceives his liberty only when he tears in pieces and when he devours.

The question is not to know whether it would be better that a certain man or a certain people had no religion than to abuse what they have, but to know what is the least evil, that religion be sometimes abused, or that there be no such restraint as religion on mankind.

To diminish the horror of atheism, they lay too much to the charge of idolatry. It is far from being true that when the ancients raised altars to a particular vice, they intended to show that they loved the vice; this signified, on the contrary, that they hated it. When the Lacedæmonians erected a temple to Fear, it was not to show that this warlike nation desired that he would in the midst of battle possess the hearts of the Lacedæmonians. They had deities to whom they prayed not to inspire

them with guilt; and others whom they besought to shield them from it.

3.—*That a moderate Government is most agreeable to the Christian Religion, and a despotic Government to the Mahommedan*

The Christian religion is a stranger to mere despotic power. The mildness so frequently recommended in the gospel is incompatible with the despotic rage with which a prince punishes his subjects, and exercises himself in cruelty.

As this religion forbids the plurality of wives, its princes are less confined, less concealed from their subjects, and consequently have more humanity: they are more disposed to be directed by laws, and more capable of perceiving that they cannot do whatever they please.

While the Mahommedan princes incessantly give or receive death, the religion of the Christians renders their princes less timid, and consequently less cruel. The prince confides in his subjects, and the subjects in the prince. How admirable the religion which, while it only seems to have in view the felicity of the other life, continues the happiness of this!

It is the Christian religion that, in spite of the extent of the empire and the influence of the climate, has hindered despotic power from being established in Ethiopia, and has carried into the heart of Africa the manners and laws of Europe.

The heir to the Empire of Ethiopia[b] enjoys a principality and gives to other subjects an example of love and obedience. Not far thence may we see the Mahommedan shutting up the children of the King of Sennar, at whose death the Council sends to murder them, in favor of the prince who mounts the throne.

Let us set before our eyes, on the one hand, the continual massacres of the kings and generals of the Greeks and Romans, and, on the other, the destruction of people and cities by those famous conquerors Timur Beg and Jenghiz Khan, who ravaged Asia, and we shall see that we owe to Christianity, in government, a certain political law; and in war, a certain law of nations—benefits which human nature can never sufficiently acknowledge.

[b] "Description of Ethiopia," by M. Ponce, Physician. "Collection of Edifying Letters."

It is owing to this law of nations that among us victory leaves these great advantages to the conquered, life, liberty, laws, wealth, and always religion, when the conqueror is not blind to his own interest.

We may truly say that the people of Europe are not at present more disunited than the people and the armies, or even the armies among themselves were, under the Roman Empire when it had become a despotic and military government. On the one hand, the armies engaged in war against each other, and, on the other, they pillaged the cities, and divided or confiscated the lands.

4.—*Consequences from the Character of the Christian Religion, and that of the Mahommedan*

From the characters of the Christian and Mahommedan religions, we ought, without any further examination, to embrace the one and reject the other: for it is much easier to prove that religion ought to humanize the manners of men than that any particular religion is true.

It is a misfortune to human nature when religion is given by a conqueror. The Mahommedan religion, which speaks only by the sword, acts still upon men with that destructive spirit with which it was founded.

The history of Sabbaco,[c] one of the pastoral kings of Egypt, is very extraordinary. The tutelar god of Thebes, appearing to him in a dream, ordered him to put to death all the priests of Egypt. He judged that the gods were displeased at his being on the throne, since they commanded him to commit an action contrary to their ordinary pleasure; and, therefore, he retired into Ethopia.

5.—*That the Catholic Religion is most agreeable to a Monarchy, and the Protestant to a Republic*

When a religion is introduced and fixed in a state, it is commonly such as is most suitable to the plan of government there established; for those who receive it, and those who are the cause of its being received, have scarcely any other idea of policy than that of the state in which they were born.

When the Christian religion, two centuries ago, became un-

[c] See "Diodorus," lib. II.

happily divided into Catholic and Protestant, the people of the North embraced the Protestant, and those of the South adhered still to the Catholic.

The reason is plain: the people of the north have, and will forever have, a spirit of liberty and independence, which the people of the south have not; and, therefore, a religion which has no visible head is more agreeable to the independence of the climate than that which has one.

In the countries themselves where the Protestant religion became established, the revolutions were made pursuant to the several plans of political government. Luther having great princes on his side would never have been able to make them relish an ecclesiastical authority that had no exterior pre-eminence; while Calvin, having to do with people who lived under republican governments, or with obscure citizens in monarchies, might very well avoid establishing dignities and preferments.

Each of these two religions was believed to be perfect; the Calvinist judging his most conformable to what Christ had said, and the Lutheran to what the Apostles had practised.

6.—*Another of Mr. Bayle's Paradoxes*

Mr. Bayle, after having abused all religions, endeavors to sully Christianity: he boldly asserts that true Christians cannot form a government of any duration. Why not? Citizens of this profession being infinitely enlightened with respect to the various duties of life, and having the warmest zeal to fulfil them, must be perfectly sensible of the rights of natural defence. The more they believe themselves indebted to religion, the more they would think due to their country. The principles of Christianity, deeply engraved on the heart, would be infinitely more powerful than the false honor of monarchies, than the humane virtues of republics, or the servile fear of despotic states.

It is astonishing that this great man should not be able to distinguish between the orders for the establishment of Christianity and Christianity itself; and that he should be liable to be charged with not knowing the spirit of his own religion. When the legislator, instead of laws, has given counsels, this is

because he knew that if these counsels were ordained as laws they would be contrary to the spirit of the laws themselves.

7.—*Of the Laws of Perfection in Religion*

Human laws, made to direct the will, ought to give precepts, and not counsels; religion, made to influence the heart, should give many counsels, and few precepts.

When, for instance, it gives rules, not for what is good, but for what is better; not to direct to what is right, but to what is perfect; it is expedient that these should be counsels, and not laws: for perfection can have no relation to the universality of men or things. Besides, if these were laws, there would be a necessity for an infinite number of others, to make people observe the first. Celibacy was advised by Christianity; when they made it a law in respect to a certain order of men, it became necessary to make new ones every day, in order to oblige those men to observe it.[d] The legislator wearied himself, and he wearied society, to make men execute by precept what those who love perfection would have executed as counsel.

8.—*Of the Connection between the moral Laws and those of Religion*

In a country so unfortunate as to have a religion that God has not revealed, it is necessary for it to be agreeable to morality; because even a false religion is the best security we can have of the probity of men.

The principal points of religion of the inhabitants of Pegu[e] are, not to commit murder, not to steal, to avoid uncleanliness, not to give the least uneasiness to their neighbor, but to do him, on the contrary, all the good in their power. With these rules they think they should be saved in any religion whatsoever. Hence it proceeds that those people, though poor and proud, behave with gentleness and compassion to the unhappy.

9.—*Of the Essenes*

The Essenes[f] made a vow to observe justice to mankind, to do no ill to any person, upon whatsoever account, to keep faith with all the world, to hate injustice, to command with

d Dupin's "Ecclesiastical Library of the 6th century," vol. v.

e "Collection of Voyages that contributed to the establishment of the East India Company," vol. iii. part I. p. 36.

f "History of the Jews," by Prideaux.

modesty, always to side with truth, and to fly from all unlawful gain.

10.—*Of the Sect of Stoics*

The several sects of philosophy among the ancients were a species of religion. Never were any principles more worthy of human nature, and more proper to form the good man, than those of the Stoics; and if I could for a moment cease to think that I am a Christian, I should not be able to hinder myself from ranking the destruction of the sect of Zeno among the misfortunes that have befallen the human race.

It carried to excess only those things in which there is true greatness—the contempt of pleasure and of pain.

It was this sect alone that made citizens; this alone that made great men; this alone great emperors.

Laying aside for a moment revealed truths, let us search through all nature, and we shall not find a nobler object than the Antoninuses; even Julian himself—Julian (a commendation thus wrested from me will not render me an accomplice of his apostasy)—no, there has not been a prince since his reign more worthy to govern mankind.

While the Stoics looked upon riches, human grandeur, grief, disquietudes, and pleasures as vanity, they were entirely employed in laboring for the happiness of mankind, and in exercising the duties of society. It seems as if they regarded that sacred spirit, which they believed to dwell within them, as a kind of favorable providence watchful over the human race.

Born for society, they all believed that it was their destiny to labor for it; with so much the less fatigue, their rewards were all within themselves. Happy by their philosophy alone, it seemed as if only the happiness of others could increase theirs.

11.—*Of Contemplation*

Men being made to preserve, to nourish, to clothe themselves, and do all the actions of society, religion ought not to give them too contemplative a life.[g]

The Mahommedans become speculative by habit; they pray five times a day, and each time they are obliged to cast behind them everything which has any concern with this world: this

[g] This is the inconvenience of the doctrine of Foe and Laockium.

forms them for speculation. Add to this that indifference for all things which is inspired by the doctrine of unalterable fate.

If other causes besides these concur to disengage their affections; for instance, if the severity of the government, if the laws concerning the property of land, give them a precarious spirit—all is lost.

The religion of the Gaurs formerly rendered Persia a flourishing kingdom; it corrected the bad effects of despotic power. The same empire is now destroyed by the Mahommedan religion.

12.—*Of Penances*

Penances ought to be joined with the idea of labor, not with that of idleness; with the idea of good, not with that of supereminence; with the idea of frugality, not with that of avarice.

13.—*Of inexpiable Crimes*

It appears from a passage of the books of the pontiffs, quoted by Cicero,[h] that they had among the Romans inexpiable crimes:[i] and it is on this that Zozymus founds the narration so proper to blacken the motives of Constantine's conversion; and Julian, that bitter raillery on this conversion in his Cæsars.

The Pagan religion, indeed, which prohibited only some of the grosser crimes, and which stopped the hand but meddled not with the heart, might have crimes that were inexpiable; but a religion which bridles all the passions; which is not more jealous of actions than of thoughts and desires; which holds us not by a few chains but by an infinite number of threads; which, leaving human justice aside, establishes another kind of justice; which is so ordered as to lead us continually from repentance to love, and from love to repentance; which puts between the judge and the criminal a greater mediator, between the just and the mediator a great judge—a religion like this ought not to have inexpiable crimes. But while it gives fear and hope to all, it makes us sufficiently sensible that though there is no crime in its own nature inexpiable, yet a whole criminal life may be so; that it is extremely dangerous to affront mercy by new crimes and new expiations; that an

h Lib. II. of "Laws."

i "Sacrum commissum, quod neque expiari poterit, impie commissum est; quod expiari poterit publici sacerdotes expianto."

uneasiness on account of ancient debts, from which we are never entirely free, ought to make us afraid of contracting new ones, of filling up the measure, and going even to that point where paternal goodness is limited.

14.—*In what Manner Religion has an Influence on Civil Laws*

As both religion and the civil laws ought to have a peculiar tendency to render men good citizens, it is evident that when one of these deviates from this end, the tendency of the other ought to be strengthened. The less severity there is in religion, the more there ought to be in the civil laws.

Thus the reigning religion of Japan having few doctrines, and proposing neither future rewards nor punishments, the laws to supply these defects have been made with the spirit of severity, and are executed with an extraordinary punctuality.

When the doctrine of necessity is established by religion, the penalties of the laws ought to be more severe, and the magistrate more vigilant; to the end that men who would otherwise become abandoned might be determined by these motives; but it is quite otherwise where religion has established the doctrine of liberty.

From the inactivity of the soul springs the Mahommedan doctrine of predestination, and from this doctrine of predestination springs the inactivity of the soul. This, they say, is in the decrees of God; they must, therefore, indulge their repose. In a case like this the magistrate ought to waken by the laws those who are lulled asleep by religion.

When religion condemns things which the civil laws ought to permit, there is danger lest the civil laws, on the other hand, should permit what religion ought to condemn. Either of these is a constant proof of a want of true ideas of that harmony and proportion which ought to subsist between both.

Thus the Tartars under Jenghiz Khan,[j] among whom it was a sin and even a capital crime to put a knife in the fire, to lean against a whip, to strike a horse with the bridle, to break one bone with another, did not believe it to be any sin to break their word, to seize upon another man's goods, to do an injury to a person, or to commit murder. In a word, laws which ren-

[j] See the relation written by John Duplan Carpin, sent to Tartary by Pope Innocent IV in the year 1246.

der that necessary which is only indifferent have this inconvenience, that they make those things indifferent which are absolutely necessary.

The people of Formosa believe [k] that there is a kind of hell, but it is to punish those who at certain seasons have not gone naked, who have dressed in calico and not in silk, who have presumed to look for oysters, or who have undertaken any business without consulting the song of birds; whilst drunkenness and debauchery are not regarded as crimes. They believe even that the debauches of their children are agreeable to their gods.

When religion absolves the mind by a thing merely accidental, it loses its greatest influence on mankind. The people of India believe that the waters of the Ganges have a sanctifying virtue.[l] Those who die on its banks are imagined to be exempted from the torments of the other life, and to be entitled to dwell in a region full of delights; and for this reason the ashes of the dead are sent from the most distant places to be thrown into this river. Little then does it signify whether they had lived virtuously or not, so they be but thrown into the Ganges.

The idea of a place of rewards has a necessary connection with the idea of the abodes of misery; and when they hope for the former without fearing the latter, the civil laws have no longer any influence. Men who think themselves sure of the rewards of the other life are above the power of the legislator; they look upon death with too much contempt. How shall the man be restrained by laws who believes that the greatest pain the magistrate can inflict will end in a moment to begin his happiness?

15.—*How false Religions are sometimes corrected by the Civil Laws*

Simplicity, superstition, or a respect for antiquity have sometimes established mysteries or ceremonies shocking to modesty: of this the world has furnished numerous examples. Aristotle says [m] that in this case the law permits the fathers of families to repair to the temple to celebrate these mysteries for

[k] "Collection of Voyages that Contributed to the establishment of the East India Company," vol. v. p. 192.

[l] "Edifying Letters," collect. 15.

[m] "Polit." lib. VII. cap. xvii.

their wives and children. How admirable the civil law which in spite of religion preserves the manners untainted!

Augustus[n] excluded the youth of either sex from assisting at any nocturnal ceremony, unless accompanied by a more aged relative; and when he revived the Lupercalia, he would not allow the young men to run naked.

16.—*How the Laws of Religion correct the Inconveniences of a political Constitution*

On the other hand, religion may support a state when the laws themselves are incapable of doing it.

Thus when a kingdom is frequently agitated by civil wars, religion may do much by obliging one part of the state to remain always quiet. Among the Greeks, the Eleans, as priests of Apollo, lived always in peace. In Japan,[o] the city of Meaco enjoys a constant peace, as being a holy city. Religion supports this regulation, and that empire, which seems to be alone upon earth, and which neither has nor will have any dependence on foreigners, has always in its own bosom a trade which war cannot ruin.

In kingdoms where wars are not entered upon by a general consent, and where the laws have not pointed out any means either of terminating or preventing them, religion establishes times of peace, or cessation from hostilities, that the people may be able to sow their corn and perform those other labors which are absolutely necessary for the subsistence of the state.

Every year all hostility ceases between the Arabian tribes for four months: the least disturbance would then be an impiety.[p] In former times, when every lord in France declared war or peace, religion granted a truce, which was to take place at certain seasons.

17.—*The same Subject continued*

When a state has many causes for hatred, religion ought to produce many ways of reconciliation. The Arabs, a people addicted to robbery, are frequently guilty of doing injury and injustice. Mahomet enacted this law:[q] "If any one forgives

[n] Suetonius, in "Augusto," cap. xxxi.

[o] "Collection of Voyages made to establish an India Company," vol. iv. p. 127.

[p] See Prideaux, "Life of Mahomet," p. 64.

[q] Koran, book I., chapter "of the Cow."

the blood of his brother,[r] he may pursue the malefactor for damages and interest; but he who shall injure the wicked, after having received satisfaction, shall, in the day of judgment, suffer the most grievous torments."

The Germans inherited the hatred and enmity of their near relatives: but these were not eternal. Homicide was expiated by giving a certain number of cattle, and all the family received satisfaction: a thing extremely useful, says Tacitus, because enmities are most dangerous among a free people.[s] I believe, indeed, that their ministers of religion, who were held by them in so much credit, were concerned in these reconciliations.

Among the inhabitants of Malacca,[t] where no form of reconciliation is established, he who has committed murder, certain of being assassinated by the relatives or friends of the deceased, abandons himself to fury, and wounds or kills all he meets.

18.—*How the Laws of Religion have the Effect of Civil Laws*

The first Greeks were small nations, frequently dispersed, pirates at sea, unjust on land, without government and without laws. The mighty actions of Hercules and Theseus let us see the state of that rising people. What could religion do more to inspire them with horror against murder? It declared that the man who had been murdered was enraged against the assassin, that he would possess his mind with terror and trouble, and oblige him to yield to him the places he had frequented when alive.[u] They could not touch the criminal, nor converse with him, without being defiled:[a] the murderer was to be expelled the city, and an expiation made for the crime.[b]

19.—*That it is not so much the Truth or Falsity of a Doctrine which renders it useful or pernicious to Men in civil Government, as the Use or Abuse of it*

The most true and holy doctrines may be attended with the very worst consequences, when they are not connected with

r On renouncing the law of retaliation.
s "De Moribus Germanorum."
t "Collection of Voyages that contributed to the establishment of the East India Company," vol. vii. p. 303. See also "Memoirs" of the C. de Forbin, and what he says of the people of Macassar.
u Plato, of "Laws," lib. IX.
a Tragedy of "Œdipus Coloneus."
b Plato, of "Laws," lib. IX.

the principles of society; and on the contrary, doctrines the most false may be attended with excellent consequences, when contrived so as to be connected with these principles.

The religion of Confucius disowns the immortality of the soul: and the sect of Zeno did not believe it. These two sects have drawn from their bad principles consequences, not just indeed, but most admirable as to their influence on society. Those of the religion of Tao, and of Foe,[c] believe the immortality of the soul; but from this sacred doctrine they draw the most frightful consequences.

The doctrine of the immortality of the soul falsely understood has, almost in every part of the globe and in every age, engaged women, slaves, subjects, friends, to murder themselves, that they might go and serve in the other world the object of their respect or love in this. Thus it was in the West Indies; thus it was among the Danes;[d] thus it is at present in Japan,[e] in Macassar,[f] and many other places.

These customs do not so directly proceed from the doctrine of the immortality of the soul as from that of the resurrection of the body, whence they have drawn this consequence, that after death the same individual will have the same wants, the same sentiments, the same passions. In this point of view, the doctrine of the immortality of the soul has a prodigious effect on mankind; because the idea of only a simple change of habitation is more within the reach of the human understanding, and more adapted to flatter the heart, than the idea of a new modification.

It is not enough for religion to establish a doctrine; it must also direct its influence. This the Christian religion performs in the most admirable manner, particularly with regard to the doctrines of which we have been speaking. It makes us hope for a state, which is the object of our belief; not for a state

c A Chinese philosopher reasons thus against the doctrine of Foe: "It is said, in a book of that sect, that the body is our dwelling place and the soul the immortal guest which lodges there; but if the bodies of our relatives are only a lodging, it is natural to regard them with the same contempt we should feel for a structure of earth and dirt. Is not this endeavoring to tear from the heart the virtue of love to one's own parents? This leads us even to neglect the care of the body, and to refuse it the compassion and affection so necessary for its preservation; hence the disciples of Foe kill themselves by thousands."—"Work of an ancient Chinese philosopher," in the Collection of Du Halde, vol. iii. p. 52.

d See Tho. Bartholin's "Antiquities of the Danes."

e "An Account of Japan," in the "Collection of Voyages that contributed to establish an East India Company."

f Forbin's "Memoirs."

which we have already experienced or known: thus every article, even the resurrection of the body, leads us to spiritual ideas.

20.—*The same Subject continued*

The sacred books *g* of the ancient Persians say, "If you would be holy instruct your children, because all the good actions which they perform will be imputed to you." They advise them to marry betimes, because children at the day of judgment will be as a bridge, over which those who have none cannot pass. These doctrines were false, but extremely useful.

21.—*Of the Metempsychosis*

The doctrine of the immortality of the soul is divided into three branches—that of pure immortality, that of a simple change of habitation, and that of a metempsychosis, that is, the system of the Christians, that of the Scythians, and that of the Indians. We have just been speaking of the first two, and I shall say of the last, that as it has been well or ill explained, it has had good or bad effects. As it inspires men with a certain horror against bloodshed, very few murders are committed in the Indies; and though they seldom punish with death, yet they enjoy a perfect tranquillity.

On the other hand, women burn themselves at the death of their husbands; thus it is only the innocent who suffer a violent death.

22.—*That it is dangerous for Religion to inspire an Aversion for Things in themselves indifferent*

A kind of honor established in the Indies by the prejudices of religion has made the several tribes conceive an aversion against each other. This honor is founded entirely on religion; these family distinctions form no civil distinctions; there are Indians who would think themselves dishonored by eating with their king.

These sorts of distinctions are connected with a certain aversion for other men, very different from those sentiments which naturally arise from difference of rank; which among us comprehends a love for inferiors.

g Mr. Hyde.

The laws of religion should never inspire an aversion to anything but vice, and above all they should never estrange man from a love and tenderness for his own species.

The Mahommedan and Indian religions embrace an infinite number of people; the Indians hate the Mahommedans, because they eat cows; the Mahommedans detest the Indians because they eat hogs.

23.—*Of Festivals*

When religion appoints a cessation from labor it ought to have greater regard to the necessities of mankind than to the grandeur of the being it designs to honor.

Athens was subject to great inconveniences from the excessive number of its festivals.[h] These powerful people, to whose decision all the cities of Greece came to submit their quarrels, could not have time to despatch such a multiplicity of affairs.

When Constantine ordained that the people should rest on the Sabbath, he made this decree for the cities,[i] and not for the inhabitants of the open country; he was sensible that labor in the cities was useful, but in the fields necessary.

For the same reason, in a country supported by commerce, the number of festivals ought to be relative to this very commerce. Protestant and Catholic countries are situated in such a manner that there is more need of labor in the former than in the latter;[j] the suppression of festivals is, therefore, more suitable to Protestant than to Catholic countries.

Dampier observes that the diversions of different nations vary greatly, according to the climate.[k] As hot climates produce a quantity of delicate fruits, the barbarians easily find necessaries, and, therefore, spend much time in diversions. The Indians of colder countries have not so much leisure, being obliged to fish and hunt continually; hence they have less music, dancing, and festivals. If a new religion should be established among these people, it ought to have regard to this in the institution of festivals.

h Xenophon "on the Republic of Athens."

i Leg. 3, cod. "de Feriis." This law was doubtless made only for the Pagans.

j The Catholics lie more towards the south, and the Protestants towards the north.

k Dampier's "Voyages," vol. ii.

24.—*Of the local Laws of Religion*

There are many local laws in various religions; and when Montezuma with so much obstinacy insisted that the religion of the Spaniards was good for their country, and his for Mexico, he did not assert an absurdity; because, in fact, legislators could never help having a regard to what nature had established before them.

The opinion of the metempsychosis is adapted to the climate of the Indies. An excessive heat burns up all the country:[l] they can breed but very few cattle; they are always in danger of wanting them for tillage; their black cattle multiply but indifferently;[m] and they are subject to many distempers. A law of religion which preserves them is, therefore, more suitable to the policy of the country.

While the meadows are scorched, rice and pulse, by the assistance of water, are brought to perfection; a law of religion which permits only this kind of nourishment must, therefore, be extremely useful to men in those climates.

The flesh of cattle in that country is insipid,[n] but the milk and butter which they receive from them serve for a part of their subsistence; therefore, the law which prohibits the eating and killing of cows is in the Indies not unreasonable.

Athens contained a prodigious multitude of people, but its territory was barren. It was, therefore, a religious maxim with this people, that those who offered some small presents to the gods honored them more than those who sacrificed an ox.[o]

25.—*The Inconvenience of transplanting a Religion from one Country to another*

It follows hence that there are frequently many inconveniences attending the transplanting a religion from one country to any other.

"The hog," says Mr. de Boulainvilliers,[p] "must be very scarce in Arabia, where there are almost no woods, and hardly anything fit for the nourishment of these animals; besides, the saltness of the water and food renders the people most susceptible of cutaneous disorders." This local law could not be

l See Bernier's "Travels," vol. ii. p. 137.
m "Edifying Letters," Col. 12, p. 95.
n Bernier's "Travels," vol. ii. p. 187.
o Euripides, in "Athenæus," lib. II.
p "Life of Mahomet."

good in other countries,[q] where the hog is almost a universal, and in some sort a necessary, nourishment.

I shall here make a reflection. Sanctorius has observed that pork transpires but little,[r] and that this kind of meat greatly hinders the transpiration of other food; he has found that this diminution amounts to a third.[s] Besides, it is known that the want of transpiration forms or increases the disorders of the skin. The feeding on pork ought rather to be prohibited in climates where the people are subject to these disorders, as in Palestine, Arabia, Egypt, and Libya.

26.—*The same Subject continued*

Sir John Chardin says[t] that there is not a navigable river in Persia, except the Kur, which is at the extremity of the empire. The ancient law of the Gaurs which prohibited sailing on rivers was not, therefore, attended with any inconvenience in this country, though it would have ruined the trade of another.

Frequent bathings are extremely useful in hot climates. On this account they are ordained in the Mahommedan law and in the Indian religion. In the Indies it is a most meritorious act to pray to God in the running stream;[u] but how could these things be performed in other climates?

When a religion adapted to the climate of one country clashes too much with the climate of another it cannot be there established; and whenever it has been introduced it has been afterwards discarded. It seems to all human appearance as if the climate had prescribed the bounds of the Christian and the Mahommedan religions.

It follows hence, that it is almost always proper for a religion to have particular doctrines, and a general worship. In laws concerning the practice of religious worship there ought to be but few particulars; for instance, they should command mortification in general and not a certain kind of mortification. Christianity is full of good sense; abstinence is of divine institution; but a particular kind of abstinence is ordained by human authority, and, therefore, may be changed.

q As in China.
r "Medicina Statica," sect. 3, aphor. 23.
s Ibid.
t "Travels into Persia," vol. ii.
u Bernier's "Travels," vol. ii.

BOOK XXV

OF LAWS IN RELATION TO THE ESTABLISHMENT OF RELIGION AND ITS EXTERNAL POLITY

1.—*Of Religious Sentiments*

THE pious man and the atheist always talk of religion; the one speaks of what he loves, and the other of what he fears.

2.—*Of the Motives of Attachment to different Religions*

The different religions of the world do not give to those who profess them equal motives of attachment; this depends greatly on the manner in which they agree with the turn of thought and perceptions of mankind.

We are extremely addicted to idolatry, and yet have no great inclination for the religion of idolaters; we are not very fond of spiritual ideas, and yet are most attached to those religions which teach us to adore a spiritual being. This proceeds from the satisfaction we find in ourselves at having been so intelligent as to choose a religion which raises the deity from that baseness in which he had been placed by others. We look upon idolatry as the religion of an ignorant people, and the religion which has a spiritual being for its object as that of the most enlightened nations.

When with a doctrine that gives us the idea of a spiritual supreme being we can still join those of a sensible nature and admit them into our worship, we contract a greater attachment to religion; because those motives which we have just mentioned are added to our natural inclinations for the objects of sense. Thus the Catholics, who have more of this kind of worship than the Protestants, are more attached to their religion than the Protestants are to theirs, and more zealous for its propagation.

When the people of Ephesus were informed that the fathers of the council had declared they might call the Virgin Mary the Mother of God, they were transported with joy, they kissed the hands of the bishops, they embraced their knees, and the whole city resounded with acclamations.[a]

When an intellectual religion superadds a choice made by the deity, and a preference for those who profess it over those who do not, this greatly attaches us to religion. The Mahommedans would not be such good Mussulmans if, on the one hand, there were not idolatrous nations who make them imagine themselves the champions of the unity of God; and on the other Christians, to make them believe that they are the objects of his preference.

A religion burdened with many ceremonies[b] attaches us to it more strongly than that which has a fewer number. We have an extreme propensity to things in which we are continually employed: witness the obstinate prejudices of the Mahommedans and the Jews,[c] and the readiness with which barbarous and savage nations change their religion, who, as they are employed entirely in hunting or war, have but few religious ceremonies.

Men are extremely inclined to the passions of hope and fear; a religion, therefore, that had neither a heaven nor a hell, could hardly please them. This is proved by the ease with which foreign religions have been established in Japan, and the zeal and fondness with which they were received.[d]

In order to raise an attachment to religion it is necessary that it should inculcate pure morals. Men who are knaves by retail are extremely honest in the gross; they love morality. And were I not treating of so grave a subject I should say that this appears remarkably evident in our theatres: we are sure of pleasing the people by sentiments avowed by morality; we are sure of shocking them by those it disapproves.

When external worship is attended with great magnificence

a St. Cyril's "Letter."

b This does not contradict what I have said in the last chapter of the preceding book: I here speak of the motives of attachment of religion, and there of the means of rendering it more general.

c This has been remarked all over the world. See, as to the Turks, the "Missions of the Levant"; the "Collection of Voyages that contributed to the establishment of an East India Company," vol. iii. p. 201, on the Moors of Bavaria; and Father Labat on the "Mahommedan Negroes," etc.

d The Christian and the Indian religions: these have a hell and a paradise, which the religion of Sintos has not.

it flatters our minds and strongly attaches us to religion. The riches of temples and those of the clergy greatly affect us. Thus even the misery of the people is a motive that renders them fond of a religion which has served as a pretext to those who were the cause of their misery.

3.—*Of Temples*

Almost all civilized nations dwell in houses; hence naturally arose the idea of building a house for God in which they might adore and seek him, amidst all their hopes and fears.

And, indeed, nothing is more comfortable to mankind than a place in which they may find the deity peculiarly present, and where they may assemble together to confess their weakness, and tell their griefs.

But this natural idea never occurred to any but such as cultivated the land; those who have no houses for themselves were never known to build temples.

This was the cause that made Jenghiz Khan discover such a prodigious contempt for mosques.[e] This prince examined the Mahomedans;[f] he approved of all their doctrines, except that of the necessity of going to Mecca; he could not comprehend why God might not be everywhere adored. As the Tartars did not dwell in houses they could have no idea of temples.

Those people who have no temples have but a small attachment to their own religion. This is the reason why the Tartars have in all times given so great a toleration;[g] why the barbarous nations, who conquered the Roman Empire did not hesitate a moment to embrace Christianity; why the savages of America have so little fondness for their own religion; why, since our missionaries have built churches in Paraguay, the natives of that country have become so zealous for ours.

As the deity is the refuge of the unhappy, and none are more unhappy than criminals, men have been naturally led to think temples an asylum for those wretches.[h] This idea appeared still more natural to the Greeks, where murderers, chased from

e Entering the mosque of Bochara, he took the Koran, and threw it under his horse's feet.—"Hist. of the Tartars," p. 273.

f Ibid. p. 342.

g This disposition of mind has been communicated to the Japanese, who, as it may be easily proved, derive their origin from the Tartars.

h See Chardin, "Persia," vol. ii. 31, edit. of 1735.

their city and the presence of men, seemed to have no houses but the temples, nor other protectors than the gods.

At first these were only designed for involuntary homicides; but when the people made them a sanctuary for those who had committed great crimes they fell into a gross contradiction. If they had offended men they had much greater reason to believe they had offended the gods.

These asylums multiplied in Greece. The temples, says Tacitus,[i] were filled with insolvent debtors and wicked slaves; the magistrate found it difficult to exercise his office; the people protected the crimes of men as the ceremonies of the gods; at length the Senate was obliged to retrench a great number of them.

The laws of Moses were perfectly wise. The man who involuntarily killed another was innocent; but he was obliged to be taken away from before the eyes of the relatives of the deceased. Moses, therefore, appointd an asylum for such unfortunate people.[j] The perpetrators of great crimes deserved not a place of safety, and they had none:[k] the Jews had only a portable tabernacle, which continually changed its place; this excluded the idea of a sanctuary. It is true that they had afterwards a temple; but the criminals who would resort thither from all parts might disturb the divine service. If persons who had committed manslaughter had been driven out of the country, as was customary among the Greeks, they had reason to fear that they would worship strange gods. All these considerations made them establish cities of safety, where they might stay till the death of the high-priest.

4.—*Of the Ministers of Religion*

The first men, says Porphyry,[l] sacrificed only vegetables. In a worship so simple every one might be priest in his own family.

The natural desire of pleasing the deity multiplied ceremonies. Hence it followed, that men employed in agriculture became incapable of observing them all and of filling up the number.

Particular places were consecrated to the gods; it then be-

[i] "Annal." lib. II.
[j] Numb. xxxv.
[k] Ibid.
[l] "De Abstinentia animal." II. 5.

came necessary that they should have ministers to take care of them; in the same manner as every citizen took care of his house and domestic affairs. Hence the people who have no priests are commonly barbarians; such were formerly the Pedalians,[m] and such are still the Wolgusky.[n]

Men consecrated to the deity ought to be honored, especially among people who have formed an idea of a personal purity necessary to approach the places most agreeable to the gods, and for the performance of particular ceremonies.

The worship of the gods requiring a continual application, most nations were led to consider the clergy as a separate body. Thus, among the Egyptians, the Jews, and the Persians,[o] they consecrated to the deity certain families who performed and perpetuated the service. There have been even religions which have not only estranged ecclesiastics from business, but have also taken away the embarrassments of a family; and this is the practice of the principal branch of Christianity.

I shall not here treat of the consequences of the law of celibacy: it is evident that it may become hurtful in proportion as the body of the clergy may be too numerous; and, in consequence of this, that of the laity too small.

By the nature of the human understanding we love in religion everything which carries the idea of difficulty; as in point of morality we have a speculative fondness for everything which bears the character of severity. Celibacy has been most agreeable to those nations to whom it seemed least adapted, and with whom it might be attended with the most fatal consequences. In the southern countries of Europe, where, by the nature of the climate, the law of celibacy is more difficult to observe, it has been retained; in those of the north, where the passions are less lively, it has been banished. Further, in countries where there are but few inhabitants it has been admitted; in those that are vastly populous it has been rejected. It is obvious that these reflections relate only to the too great extension of celibacy, and not to celibacy itself.

m Lilius Giraldus, p. 726.

n A people of Siberia. See the account given by Mr. Everard Ysbrant Ides, in the "Collection of Travels to the North," vol. viii.

o Mr. Hyde.

5.—*Of the Bounds which the Laws ought to prescribe to the Riches of the Clergy*

As particular families may be extinct, their wealth cannot be a perpetual inheritance. The clergy is a family which cannot be extinct; wealth is, therefore, fixed to it forever, and cannot go out of it.

Particular families may increase; it is necessary then that their wealth should also increase. The clergy is a family which ought not to increase; their wealth ought then to be limited.

We have retained the regulations of the Levitical laws as to the possessions of the clergy, except those relating to the bounds of these possessions; indeed, among us we must ever be ignorant of the limit beyond which any religious community can no longer be permitted to acquire.

These endless acquisitions appear to the people so unreasonable that he who should speak in their defence would be regarded as an idiot.

The civil laws find sometimes many difficulties in altering established abuses, because they are connected with things worthy of respect; in this case an indirect proceeding would be a greater proof of the wisdom of the legislator than another which struck directly at the thing itself. Instead of prohibiting the acquisitions of the clergy we should seek to give them a distaste for them; to leave them the right and to take away the deed.

In some countries of Europe, a respect for the privileges of the nobility has established in their favor a right of indemnity over immovable goods acquired in mortmain. The interest of the prince has in the same case made him exact a right of amortization. In Castile, where no such right prevails, the clergy have seized upon everything. In Aragon, where there is some right of amortization, they have obtained less; in France, where this right and that of indemnity are established, they have acquired less still; and it may be said that the prosperity of this kingdom is in a great measure owing to the exercise of these two rights. If possible, then, increase these rights, and put a stop to the mortmain.

Render the ancient and necessary patrimony of the clergy

sacred and inviolable, let it be fixed and eternal like that body itself, but let new inheritances be out of their power.

Permit them to break the rule when the rule has become an abuse; suffer the abuse when it enters into the rule.

They still remember in Rome a certain memorial sent thither on some disputes with the clergy, in which was this maxim: "The clergy ought to contribute to the expenses of the state, let the Old Testament say what it will." They concluded from this passage that the author of this memorial was better versed in the language of the tax-gatherers, than in that of religion.

6.—*Of Monasteries*

The least degree of common sense will let us see that bodies designed for a perpetual continuance should not be allowed to sell their funds for life, nor to borrow for life; unless we want them to be heirs to all those who have no relatives and to those who do not choose to have any. These men play against the people, but they hold the bank themselves.

7.—*Of the Luxury of Superstition*

"Those are guilty of impiety towards the gods," says Plato,[p] "who deny their existence; or who, while they believe it, maintain that they do not interfere with what is done below; or, in fine, who think that they can easily appease them by sacrifices: three opinions equally pernicious." Plato has here said all that the clearest light of nature has ever been able to say in point of religion. The magnificence of external worship has a principal connection with the institution of the state. In good republics, they have curbed not only the luxury of vanity, but even that of superstition. They have introduced frugal laws into religion. Of this number are many of the laws of Solon; many of those of Plato on funerals, adopted by Cicero; and, in fine, some of the laws of Numa on sacrifices.[q]

Birds, says Cicero,[r] and paintings begun and finished in a day are gifts the most divine. We offer common things, says a Spartan,[s] that we may always have it in our power to honor the gods.

[p] "Of Laws," book X.

[q] "Rogum vino ne respergito."—"Law of the Twelve Tables."

[r] Cicero derives these appropriate words from Plato ("Laws," book XII.).—Ed.

[s] Plutarch attributes this beautiful idea to Lycurgus.—Ed.

The desire of man to pay his worship to the deity is very different from the magnificence of this worship. Let us not offer our treasures to him if we are not proud of showing that we esteem what he would have us despise.

" What must the gods think of the gifts of the impious," said the admirable Plato, " when a good man would blush to receive presents from a villain? "

Religion ought not, under the pretence of gifts, to draw from the people what the necessity of the state has left them; but as Plato says,[1] " The chaste and the pious ought to offer gifts which resemble themselves."

Nor is it proper for religion to encourage expensive funerals. What is there more natural than to take away the difference of fortune in a circumstance and in the very moment which equals all fortunes?

8.—*Of the Pontificate*

When religion has many ministers it is natural for them to have a chief and for a sovereign pontiff to be established. In monarchies, where the several orders of the state cannot be kept too distinct, and where all powers ought not to be lodged in the same person, it is proper that the pontificate be distinct from the empire. The same necessity is not to be met with in a despotic government, the nature of which is to unite all the different powers in the same person. But in this case it may happen, that the prince may regard religion as he does the laws themselves, as dependent on his own will. To prevent this inconvenience, there ought to be monuments of religion, for instance, sacred books which fix and establish it. The King of Persia is the chief of the religion; but this religion is regulated by the Koran. The Emperor of China is the sovereign pontiff; but there are books in the hands of everybody to which he himself must conform. In vain a certain emperor attempted to abolish them; they triumphed over tyranny.

9.—*Of Toleration in point of Religion*

We are here politicians, and not divines; but the divines themselves must allow that there is a great difference between tolerating and approving a religion.

[1] " On Laws," book II.

When the legislator has believed it a duty to permit the exercise of many religions, it is necessary that he should enforce also a toleration among these religions themselves. It is a principle that every religion which is persecuted becomes itself persecuting; for as soon as by some accidental turn it arises from persecution, it attacks the religion which persecuted it; not as religion, but as tyranny.

It is necessary, then, that the laws require from the several religions, not only that they shall not embroil the state, but that they shall not raise disturbances among themselves. A citizen does not fulfil the laws by not disturbing the government; it is requisite that he should not trouble any citizen whomsoever.

10.—*The same Subject continued*

As there are scarcely any but persecuting religions that have an extraordinary zeal for being established in other places (because a religion that can tolerate others seldom thinks of its own propagation), it must, therefore, be a very good civil law, when the state is already satisfied with the established religion, not to suffer the establishment of another.[u]

This is then a fundamental principle of the political laws in regard to religion; that when the state is at liberty to receive or to reject a new religion it ought to be rejected; when it is received it ought to be tolerated.

11.—*Of changing a Religion*

A prince who undertakes to destroy or to change the established religion of his kingdom must greatly expose himself. If his government be despotic, he runs a much greater risk of seeing a revolution arise from such a proceeding, than from any tyranny whatsoever, and a revolution is not an uncommon thing in such states. The reason of this is that a state cannot change its religion, manners, and customs in an instant, and with the same rapidity as the prince publishes the ordinance which establishes a new religion.

Besides, the ancient religion is connected with the constitu-

[u] I do not mean to speak in this chapter of the Christian religion; for, as I have elsewhere observed, the Christian religion is our chief blessing. See the end of the preceding chapter, and the "Defence of the Spirit of Laws," part II.

tion of the kingdom and the new one is not; the former agrees with the climate and very often the new one is opposed to it. Moreover, the citizens become disgusted with their laws, and look upon the government already established with contempt; they conceive a jealousy against the two religions, instead of a firm belief in one; in a word, these innovations give to the state, at least for some time, both bad citizens and bad believers.

12.—*Of penal Laws*

Penal laws ought to be avoided in respect to religion: they imprint fear, it is true; but as religion has also penal laws which inspire the same passion, the one is effaced by the other, and between these two different kinds of fear the mind becomes hardened.

The threatenings of religion are so terrible, and its promises so great, that when they actuate the mind, whatever efforts the magistrate may use to oblige us to renounce it, he seems to leave us nothing when he deprives us of the exercise of our religion, and to bereave us of nothing when we are allowed to profess it.

It is not, therefore, by filling the soul with the idea of this great object, by hastening her approach to that critical moment in which it ought to be of the highest importance, that religion can be most successfully attacked: a more certain way is, to tempt her by favors, by the conveniences of life, by hopes of fortune; not by that which revives, but by that which extinguishes the sense of her duty; not by that which shocks her, but by that which throws her into indifference at the time when other passions actuate the mind, and those which religion inspires are hushed into silence. As a general rule in changing a religion the invitations should be much stronger than the penalties.

The temper of the human mind has appeared even in the nature of punishments. If we take a survey of the persecutions in Japan,[v] we shall find that they were more shocked at cruel torments than at long sufferings, which rather weary than affright, which are the more difficult to surmount, from their appearing less difficult.

[v] In the "Collection of Voyages that contributed to the establishment of an East India Company," vol. v.

In a word, history sufficiently informs us that penal laws have never had any other effect than to destroy.

13.—*A most humble Remonstrance to the Inquisitors of Spain and Portugal*

A Jewess of eighteen years of age, who was burned at Lisbon at the last *auto-da-fé*, gave occasion to the following little piece, the most idle, I believe, that ever was written. When we attempt to prove things so evident we are sure never to convince.

The author declares, that though a Jew he has a respect for the Christian religion; and that he should be glad to take away from the princes who are not Christians, a plausible pretence for persecuting this religion.

"You complain," says he to the Inquisitors, "that the Emperor of Japan caused all the Christians in his dominions to be burned by a slow fire. But he will answer, we treat you who do not believe like us, as you yourselves treat those who do not believe like you; you can only complain of your weakness, which has hindered you from exterminating us, and which has enabled us to exterminate you.

"But it must be confessed, that you are much more cruel than this emperor. You put us to death who believe only what you believe, because we do not believe all that you believe. We follow a religion, which you yourselves know to have been formerly dear to God. We think that God loves it still, and you think that he loves it no more: and because you judge thus, you make those suffer by sword and fire who hold an error so pardonable as to believe that God still loves what he once loved.[w]

"If you are cruel to us, you are much more so to our children; you cause them to be burned because they follow the inspirations given them by those whom the law of nature and the laws of all nations teach them to regard as gods.

"You deprive yourselves of the advantage you have over the Mahommedans, with respect to the manner in which their religion was established. When they boast of the number of their believers, you tell them that they have obtained them by

[w] The source of the blindness of the Jews is their not perceiving that the economy of the gospel is in the order of the decrees of God; and that it is in this light a consequence of his immutability.

violence, and that they have extended their religion by the sword; why then do you establish yours by fire?

"When you would bring us over to you, we object to a source from which you glory to have descended. You reply to us, that though your religion is new, it is divine; and you prove it from its growing amidst the persecutions of pagans, and when watered by the blood of your martyrs; but at present you play the part of the Diocletians, and make us take yours.

"We conjure you, not by the mighty God whom both you and we serve, but by that Christ, who, you tell us, took upon him a human form, to propose himself as an example for you to follow; we conjure you to behave to us as he himself would behave were he upon earth. You would have us become Christians, and you will not be so yourselves.

"But if you will not be Christians, be at least men; treat us as you would, if having only the weak light of justice which nature bestows, you had not a religion to conduct, and a revelation to enlighten you.

"If Heaven has had so great a love for you as to make you see the truth, you have received a singular favor; but is it for children who have received the inheritance of their father, to hate those who have not?

"If you have this truth, hide it not from us by the manner in which you propose it. The characteristic of truth is its triumph over hearts and minds, and not that impotency which you confess when you would force us to receive it by tortures.

"If you were wise, you would not put us to death for no other reason than because we are unwilling to deceive you. If your Christ is the son of God, we hope he will reward us for being so unwilling to profane his mysteries; and we believe that the God whom both you and we serve will not punish us for having suffered death for a religion which he formerly gave us, only because we believe that he still continues to give it.

"You live in an age in which the light of nature shines more brightly than it has ever done; in which philosophy has enlightened human understandings; in which the morality of your gospel has been better known; in which the respective rights of mankind with regard to each other and the empire which one conscience has over another are best understood. If you do not, therefore, shake off your ancient prejudices,

which, whilst unregarded, mingle with your passions, it must be confessed that you are incorrigible, incapable of any degree of light or instruction; and a nation must be very unhappy that gives authority to such men.

"Would you have us frankly tell you our thoughts? You consider us rather as your enemies than as the enemies of your religion; for if you loved your religion you would not suffer it to be corrupted by such gross ignorance.

"It is necessary that we should warn you of one thing; that is, if any one in times to come shall dare to assert, that in the age in which we live, the people of Europe were civilized, you will be cited to prove that they were barbarians; and the idea they will have of you will be such as will dishonor your age, and spread hatred over all your contemporaries."

14.—*Why the Christian Religion is so odious in Japan*

We have already mentioned the perverse temper of the people of Japan.[r] The magistrates considered the firmness which Christianity inspires, when they attempted to make the people renounce their faith, as in itself most dangerous; they fancied that it increased their obstinacy. The law of Japan punishes severely the least disobedience. The people were ordered to renounce the Christian religion; they did not renounce it; this was disobedience; the magistrates punished this crime; and the continuance in disobedience seemed to deserve another punishment.

Punishments among the Japanese are considered as the revenge of an insult done to the prince; the songs of triumph sung by our martyrs appeared as an outrage against him: the title of martyr provoked the magistrates; in their opinion it signified rebel; they did all in their power to prevent their obtaining it. Then it was that their minds were exasperated, and a horrid struggle was seen between the tribunals that condemned and the accused who suffered; between the civil laws and those of religion.

[r] Book IV. chap. xxiv.

15.—*Of the Propagation of Religion*

All the people of the East, except the Mahommedans, believe all religions in themselves indifferent. They fear the establishment of another religion, no otherwise than as a change in government. Among the Japanese, where there are many sects, and where the state has had for so long a time an ecclesiastical superior, they never dispute on religion.*y* It is the same with the people of Siam.*z* The Calmucks *a* do more, they make it a point of conscience to tolerate every species of religion; at Calicut it is a maxim of the state, that every religion is good.*b*

But it does not follow hence, that a religion brought from a far distant country, and quite different in climate, laws, manners, and customs, will have all the success to which its holiness might entitle it. This is more particularly true in great despotic empires: here strangers are tolerated at first, because there is no attention given to what does not seem to strike at the authority of the prince. As they are extremely ignorant, a European may render himself agreeable by the knowledge he communicates: this is very well in the beginning. But as soon as he has any success, when disputes arise and when men who have some interest become informed of it, as their empire, by its very nature, above all things requires tranquillity, and as the least disturbance may overturn it, they proscribe the new religion and those who preach it: disputes between the preachers breaking out, they begin to entertain a distaste for religion on which even those who propose it are not agreed.

y See Kempfer.
z Forbin's "Memoirs."
a "History of the Tartars," part V.
b Pirard's "Travels," chap. xxvii.

BOOK XXVI

OF LAWS IN RELATION TO THE ORDER OF THINGS WHICH THEY DETERMINE

1.—*Idea of this Book*

MEN are governed by several kinds of laws; by the law of nature; by the divine law, which is that of religion; by ecclesiastical, otherwise called canon law, which is that of religious polity; by the law of nations, which may be considered as the civil law of the whole globe, in which sense every nation is a citizen; by the general political law, which relates to that human wisdom whence all societies derive their origin; by the particular political law, the object of which is each society; by the law of conquest founded on this, that one nation has been willing and able, or has had a right to offer violence to another; by the civil law of every society, by which a citizen may defend his possessions and his life against the attacks of any other citizen; in fine, by domestic law, which proceeds from a society's being divided into several families, all which have need of a particular government.

There are therefore different orders of laws, and the sublimity of human reason consists in perfectly knowing to which of these orders the things that are to be determined ought to have a principal relation, and not to throw into confusion those principles which should govern mankind.

2.—*Of Laws divine and human*

We ought not to decide by divine laws what should be decided by human laws; nor determine by human what should be determined by divine laws.

These two sorts of laws differ in their origin, in their object, and in their nature.

It is universally acknowledged, that human laws are, in their

own nature, different from those of religion; this is an important principle: but this principle is itself subject to others, which must be inquired into.

1. It is in the nature of human laws to be subject to all the accidents which can happen, and to vary in proportion as the will of man changes; on the contrary, by the nature of the laws of religion, they are never to vary. Human laws appoint for some good; those of religion for the best: good may have another object, because there are many kinds of good; but the best is but one, it cannot therefore change. We may alter laws, because they are reputed no more than good; but the institutions of religion are always supposed to be the best.

2. There are kingdoms in which the laws are of no value as they depend only on the capricious and fickle humor of the sovereign. If in these kingdoms the laws of religion were of the same nature as the human institutions, the laws of religion too would be of no value. It is, however, necessary to the society that it should have something fixed; and it is religion that has this stability.

3. The influence of religion proceeds from its being believed; that of human laws from their being feared. Antiquity accords with religion, because we have frequently a firmer belief in things in proportion to their distance, for we have no ideas annexed to them drawn from those times which can contradict them. Human laws, on the contrary, receive advantage from their novelty, which implies the actual and particular attention of the legislator to put them in execution.

3.—*Of civil Laws contrary to the Law of Nature*

If a slave, says Plato, defends himself, and kills a freeman, he ought to be treated as a parricide.[a] This is a civil law which punishes self-defence, though dictated by nature.

The law of Henry VIII which condemned a man without being confronted by witnesses was contrary to self-defence. In order to pass sentence of condemnation, it is necessary that the witnesses should know whether the man against whom they make their deposition is he whom they accuse, and that this man be at liberty to say, I am not the person you mean.

The law passed during the same reign, which condemned

[a] Lib. IX. "on Laws."

every woman, who, having carried on a criminal commerce did not declare it to the king before her marriage, violated the regard due to natural modesty. It is as unreasonable to oblige a woman to make this declaration, as to oblige a man not to attempt the defence of his own life.

The law of Henry II which condemned the woman to death who lost her child, in case she did not make known her pregnancy to the magistrate, was not less contrary to self-defence. It would have been sufficient to oblige her to inform one of her nearest relatives, who might watch over the preservation of the infant.

What other information could she give in this situation, so torturing to natural modesty? Education has heightened the notion of preserving that modesty; and in those critical moments scarcely has she any idea remaining of the loss of life.

There has been much talk of a law in England, which permitted girls seven years old to choose a husband.[b] This law was shocking in two ways; it had no regard to the time when nature gives maturity to the understanding, nor to that in which she gives maturity to the body.

Among the Romans, a father might oblige his daughter to repudiate her husband, though he himself had consented to the marriage.[c] But it is contrary to nature for a divorce to be in the power of a third person.

A divorce can be agreeable to nature only when it is by consent of the two parties, or at least of one of them; but when neither consents it is a monstrous separation. In short, the power of divorce can be given only to those who feel the inconveniences of marriage, and who are sensible of the moment when it is for their interest to make them cease.

4.—*The same Subject continued*

Gundebald, King of Burgundy, decreed, that if the wife or son of a person guilty of robbery did not reveal the crime, they were to become slaves.[d] This was contrary to nature: a wife to inform against her husband! a son to accuse his father! To avenge one criminal action, they ordained another still more criminal.

The law of Recessuinthus permits the children of the adulter-

b Mr. Bayle, in his "Criticism on the History of Calvinism," speaks of this law, p. 263.

c See Law 5, in the code "de repudiis et judicio de moribus sublato."

d Law of the Burgundians, tit. 47.

ess, or those of her husband, to accuse her, and to put the slaves of the house to the torture.[e] How iniquitous the law, which, to preserve a purity of morals, overturns nature, the origin, the source of all morality!

With pleasure we behold in our theatres a young hero[f] express as much horror against the discovery of his mother-in-law's guilt, as against the guilt itself. In his surprise, though accused, judged, condemned, proscribed, and covered with infamy, he scarcely dares to reflect on the abominable blood whence Phædra sprang; he abandons the most tender object, all that is most dear, all that lies nearest his heart, all that can fill him with rage, to deliver himself up to the unmerited vengeance of the gods. It is nature's voice, the sweetest of all sounds, that inspires us with this pleasure.

5.—*Cases, in which we may judge by the Principles of the civil Law in limiting the Principles of the Law of Nature*

An Athenian law obliged children to provide for their fathers when fallen into poverty;[g] it excepted those who were born of a courtesan,[h] those whose chastity had been infamously prostituted by their father, and those to whom he had not given any means of gaining a livelihood.[i]

The law considered that, in the first case, the father being uncertain, he had rendered the natural obligation precarious; that in the second, he had sullied the life he had given, and done the greatest injury he could do to his children in depriving them of their reputation; that in the third, he had rendered insupportable a life which had no means of subsistence. The law suspended the natural obligation of children, because the father had violated his; it looked upon the father and the son as no more than two citizens, and determined in respect to them only from civil and political views; ever considering that a good republic ought to have a particular regard to manners. I am apt to think, that Solon's law was a wise regulation in the first two cases, whether that in which nature has left the son in ignorance with regard to his father, or that in which she even seems to ordain he should

e In the code of the Visigoths, lib. III. tit. 4, sec. 13.

f Hippolyte; see the "Phèdre" of Racine, act. IV. sc. 2.—Ed.

g Under pain of infamy, another under pain of imprisonment.

h Plutarch, "Life of Solon."

i Ibid., and Gallienus, in "exhort. ad art." cap. viii.

not own him; but it cannot be approved with respect to the third, where the father had only violated a civil institution.

6.—*That the Order of succession or Inheritance depends on the Principles of political or civil Law, and not on those of the Law of Nature*

The Voconian law ordained that no woman should be left heiress to an estate, not even if she had an only child. Never was there a law, says St. Augustine, more unjust.[j] A formula of Marculfus treats that custom as impious which deprives daughters of the right of succeeding to the estate of their fathers.[k] Justinian gives the appellation of barbarous to the right which the males had formerly of succeeding in prejudice to the daughters.[l] These notions proceeded from their having considered the right of children to succeed to their father's possessions as a consequence of the law of nature; which it is not.

The law of nature ordains that fathers shall provide for their children; but it does not oblige them to make them their heirs. The division of property, the laws of this division, and the succession after the death of the person who has had this division can be regulated only by the community, and consequently by political or civil laws.

True it is, that a political or civil order frequently demands that children should succeed to their father's estate; but it does not always make this necessary.

There may be some reasons given why the laws of our fiefs appoint that the eldest of the males, or the nearest relatives of the male side, should have all, and the females nothing, and why, by the laws of the Lombards,[m] the sisters, the natural children, the other relatives; and, in their default, the treasury might share the inheritance with the daughters.

It was regulated in some of the dynasties of China, that the brothers of the emperor should succeed to the throne, and that the children should not. If they were willing that the prince should have a certain degree of experience, if they feared his being too young, and if it had become necessary to prevent eunuchs from placing children successively on the throne, they might very justly establish a like order of succession, and when some

j "De Civitate Dei," lib. IV.
k Lib. II. cap. xii.
l "Novell." 21.
m Lib. II. tit. 14, sec. 6, 7, and 8.

writers have treated these brothers as usurpers, they have judged only by ideas received from the laws of their own countries.[n]

According to the custom of Numidia,[o] Desalces, brother of Gala, succeeded to the kingdom, not Massinissa, his son. And even to this day, among the Arabs in Barbary, where each village has its chief, they adhere to this ancient custom, by choosing the uncle, or some other relative to succeed.[p]

There are monarchies merely elective; and since it is evident that the order of succession ought to be derived from the political or civil laws, it is for these to decide in what cases it is agreeable to reason that the succession be granted to children, and in what cases it ought to be given to others.

In countries where polygamy is established, the prince has many children; and the number of them is much greater in some of these countries than in others. There are states [q] where it is impossible for the people to maintain the children of the king; they might therefore make it a law that the crown shall devolve, not on the king's children, but on those of his sister.

A prodigious number of children would expose the state to the most dreadful civil wars. The order of succession which gives the crown to the children of the sister, the number of whom is not larger than those of a prince who has only one wife, must prevent these inconveniences.

There are people among whom reasons of state, or some maxims of religion, have made it necessary that the crown should be always fixed in a certain family: hence, in India, proceeds the jealousy of their tribes,[r] and the fear of losing the descent; they have there conceived that never to want princes of the blood royal, they ought to take the children of the eldest sister of the king.

A general maxim: it is an obligation of the law of nature to provide for our children; but to make them our successors is an obligation of the civil or political law. Hence are derived the different regulations with respect to bastards in the different countries of the world; these are according to the civil or political laws of each country.

[n] Du Halde "on the Second Dynasty."

[o] Livy, decad. 3, lib. VI.

[p] Shaw's "Travels," vol. i. p. 402.

[q] See the "Collection of Voyages that contributed to the establishment of an East India Company," vol. iv. part I. p. 114. And Mr. Smith's "Voyage to Guinea," part II. p. 150, concerning the kingdom of Judia.

[r] See "Edifying Letters," Let. 14, and the "Voyages that contributed to the establishment of an East India Company," vol. iii. part II. p. 644.

7.—*That we ought not to decide by the Precepts of Religion what belongs only to the Law of Nature*

The Abyssinians have a most severe fast of fifty days, which weakens them to such a degree, that for a long time they are incapable of business: the Turks do not fail to attack them after their lent.[s] Religion ought, in favor of the natural right of self-defence, to set bounds to these customs.

The Jews were obliged to keep the Sabbath; but it was an instance of great stupidity in this nation not to defend themselves when their enemies chose to attack them on this day.[t]

Cambyses laying siege to Pelusium, set in the first rank a great number of those animals which the Egyptians regarded as sacred; the consequence was, that the soldiers of the garrison durst not molest them. Who does not see that self-defence is a duty superior to every precept?

8.—*That we ought not to regulate by the Principles of the canon Law Things which should be regulated by those of the civil Law*

By the civil law of the Romans [u] he who took a thing privately from a sacred place was punished only for the guilt of theft; by the canon law, he was punished for the crime of sacrilege.[v] The canon law takes cognizance of the place; the civil laws of the fact. But to attend only to the place is neither to reflect on the nature and definition of a theft, nor on the nature and definition of sacrilege.

As the husband may demand a separation by reason of the infidelity of his wife, the wife might formerly demand it, on account of the infidelity of the husband.[w] This custom, contrary to a regulation made in the Roman laws,[x] was introduced into the ecclesiastic court,[y] where nothing was regarded but the maxims of canon law; and indeed, if we consider marriage as a thing merely spiritual, and as relating only to the things of another life, the violation is in both cases the same, but the political and civil laws of almost all nations have, with reason, made a distinction

[s] "Collection of Voyages that contributed to the establishment of an East India Company," vol. iv. pp. 35 and 103.

[t] As they did when Pompey besieged the Temple. Dio. XXXVI.—Ed.

[u] Leg. ff. "ad leg. Juliam peculatus."

[v] Capite quisquis 17, quæstione 4. "Cujas" observat. lib. XIII. cap. xix. tom. iii.

[w] Beaumanoir "on the ancient customs of Beauvoisis," chap. xviii.

[x] Law of the first Code, "ad leg. Juliam de adulteriis."

[y] At present they do not take cognizance of these things in France.

between them. They have required from the women a degree of reserve and continency, which they have not exacted from the men; because in women, a violation of chastity supposes a renunciation of all virtue; because women, by violating the laws of marriage, quit the state of their natural dependence; because nature has marked the infidelity of women with certain signs; and, in fine, because the children of the wife born in adultery necessarily belong and are an expense to the husband, while the children produced by the adultery of the husband are not the wife's, nor are an expense to the wife.

9.—*That Things which ought to be regulated by the Principles of civil Law can seldom be regulated by those of Religion*

The laws of religion have a greater sublimity; the civil laws a greater extent.

The laws of perfection drawn from religion have more in view the goodness of the person that observes them than of the society in which they are observed; the civil laws, on the contrary, have more in view the moral goodness of men in general than that of individuals.

Thus, venerable as those ideas are which immediately spring from religion, they ought not always to serve as a first principle to the civil laws; because these have another, the general welfare of society.

The Romans made regulations among themselves to preserve the morals of their women; these were political institutions. Upon the establishment of monarchy, they made civil laws on this head, and formed them on the principles of their civil government. When the Christian religion became predominant, the new laws that were then made had less relation to the general rectitude of morals, than to the holiness of marriage; they had less regard to the union of the two sexes in a civil, than in a spiritual state.

At first, by the Roman law, a husband, who brought back his wife into his house after she had been found guilty of adultery, was punished as an accomplice in her debauch.[z] Justinian, from other principles, ordained that during the space of two years he might go and take her again out of the monastery.[a]

z Leg. 11, sec. ult. ff. "ad leg. Juliam de adulteriis."

a "Nov." 134, Col. 9, cap. x. tit. 170.

Formerly, when a woman, whose husband was gone to war, heard no longer any tidings of him, she might easily marry again, because she had in her hands the power of making a divorce. The law of Constantine obliged the woman to wait four years, after which she might send the bill of divorce to the general; and, if her husband returned, he could not then charge her with adultery.[b] But Justinian decreed, that let the time be never so long after the departure of her husband, she should not marry unless, by the deposition and oath of the general, she could prove the death of her husband.[c] Justinian had in view the indissolubility of marriage; but we may safely say that he had it too much in view. He demanded a positive proof when a negative one was sufficient; he required a thing extremely difficult to give, an account of the fate of a man at a great distance, and exposed to so many accidents; he presumed a crime, that is, a desertion of the husband, when it was so natural to presume his death. He injured the commonwealth, by obliging women to live out of marriage; he injured individuals, by exposing them to a thousand dangers.

The law of Justinian, which ranked among the causes of divorce the consent of the husband and wife to enter into a monastery, was entirely opposite to the principles of the civil laws.[d] It is natural that the causes of divorce should have their origin in certain impediments which could not be foreseen before marriage; but this desire of preserving chastity might be foreseen, since it is in ourselves. This law favors inconstancy in a state which is by its very nature perpetual; it shook the fundamental principle of divorce, which permits the dissolution of one marriage only from the hope of another. In short, if we view it in a religious light, it is no more than giving victims to God without a sacrifice.

10.—*In what Case we ought to follow the civil Law which permits, and not the Law of Religion which forbids*

When a religion which prohibits polygamy is introduced into a country where it is permitted, we cannot believe (speaking only as a politician) that the laws of the country ought to suffer

b Leg. 7, "de repudiis, et judicio de morib. sublato."

c Auth. hodie quantiscumque cod. "de repudiis."

d Auth. quod hodie cod. "de repudiis."

a man who has many wives to embrace this religion; unless the magistrate or the husband should indemnify them, by restoring them in some way or other to their civil state. Without this their condition would be deplorable; no sooner would they obey the laws than they would find themselves deprived of the greatest advantages of society.

11.—*That human Courts of Justice should not be regulated by the Maxims of those Tribunals which relate to the other Life*

The tribunal of the inquisition, formed by the Christian monks on the idea of the tribunal of penitence, is contrary to all good policy. It has everywhere met with a general dislike, and must have sunk under the oppositions it met with, if those who were resolved to establish it had not drawn advantages even from these oppositions.

This tribunal is insupportable in all governments. In monarchies, it only makes informers and traitors: in republics, it only forms dishonest men; in a despotic state, it is as destructive as the government itself.

12.—*The same Subject continued*

It is one abuse of this tribunal, that of two persons accused of the same crime, he who denies is condemned to die; and he who confesses avoids the punishment. This has its source in monastic ideas, where he who denies seems in a state of impenitence and damnation; and he who confesses, in a state of repentance and salvation. But a distinction of this kind can have no relation to human tribunals. Human justice, which sees only the actions, has but one compact with men, namely, that of innocence; divine justice, which sees the thoughts, has two, that of innocence and repentance.

13.—*In what Cases, with regard to Marriage, we ought to follow the Laws of Religion; and in what Cases we should follow the civil Laws*

It has happened in all ages and countries, that religion has been blended with marriages. When certain things have been considered as impure or unlawful, and had nevertheless become necessary, they were obliged to call in religion to legitimate in the one case, and to reprove in others.

On the other hand, as marriage is of all human actions that in which society is most interested, it became proper that this should be regulated by the civil laws.

Everything which relates to the nature of marriage, its form, the manner of contracting it, the fruitfulness it occasions, which has made all nations consider it as the object of a particular benediction, a benediction which, not being always annexed to it, is supposed to depend on certain superior graces; all this is within the resort of religion.

The consequences of this union with regard to property, the reciprocal advantages, everything which has a relation to the new family, to that from which it sprang, and to that which is expected to arise; all this relates to the civil laws.

As one of the great objects of marriage is to take away that uncertainty which attends unlawful conjunctions, religion here stamps its seal, and the civil laws join theirs to it, to the end that it may be as authentic as possible. Thus, besides the conditions required by religion to make a marriage valid, the civil laws may still exact others.

The civil laws receive this power from their being additional obligations, and not contradictory ones. The law of religion insists upon certain ceremonies, the civil laws on the consent of fathers; in this case, they demand something more than that of religion, but they demand nothing contrary to it.

It follows hence, that the religious law must decide whether the bond be indissoluble or not; for if the laws of religion had made the bond indissoluble, and the civil laws had declared it might be broken, they would be contradictory to each other.

Sometimes the regulations made by the civil laws with respect to marriage, are not absolutely necessary; such are those established by the laws, which, instead of annulling the marriage, only punish those who contract it.

Among the Romans, the Papian law declared those marriages illegal which had been prohibited, and yet only subjected them to a penalty;[e] but a *senatus-consultum*, made at the instance of the Emperor Marcus Antoninus, declared them void; there then no longer subsisted any such thing as a marriage, wife, dowry, or

[e] See what has been said on this subject, in book XXIII. chap. 21, in the relation they bear to the number of inhabitants.

husband.[f] The civil laws determine according to circumstances: sometimes they are most attentive to repair the evil; at others, to prevent it.

14.—*In what instances Marriages between Relatives shall be regulated by the Laws of Nature: and in what instances by the civil Laws*

With regard to the prohibition of marriage between relatives, it is a thing extremely delicate to fix exactly the point at which the laws of nature stop and where the civil laws begin. For this purpose we must establish some principles.

The marriage of the son with the mother confounds the state of things: the son ought to have an unlimited respect for his mother, the wife an unlimited respect for her husband; therefore the marriage of the mother to her son would subvert the natural state of both.

Besides, nature has forwarded in women the time in which they are able to have children, but has retarded it in men; and, for the same reason, women sooner lose this ability and men later. If the marriage between the mother and the son were permitted, it would almost always be the case that when the husband was capable of entering into the views of nature, the wife would be incapable.

The marriage between the father and the daughter is contrary to nature, as well as the other; but it is not less contrary, because it has not these two obstacles. Thus, the Tartars, who may marry their daughters,[g] never marry their mothers, as we see in the accounts we have of that nation.[h]

It has ever been the natural duty of fathers to watch over the chastity of their children. Intrusted with the care of their education, they are obliged to preserve the body in the greatest perfection, and the mind from the least corruption; to encourage whatever has a tendency to inspire them with virtuous desires, and to nourish a becoming tenderness. Fathers, always employed in preserving the morals of their children, must have a natural aversion to everything that can render them corrupt. Marriage, you

[f] See law 16, ff. "de ritu nuptiarum"; and law 3, sec. 1, also Digest, "de donationibus inter virum et uxorem."

[g] This law is very ancient among them. Attila, says Priscus, in his embassy stopped in a certain place to marry Esca his daughter. "A thing permitted," he adds, "by the laws of the Scythians," p. 22.

[h] "Hist. of the Tartars," part III p. 236.

will say, is not a corruption; but before marriage they must speak, they must make their persons beloved, they must seduce; it is this seduction which ought to inspire us with horror.

There should be therefore an insurmountable barrier between those who ought to give the education, and those who are to receive it, in order to prevent every kind of corruption, even though the motive be lawful. Why do fathers so carefully deprive those who are to marry their daughters of their company and familiarity?

The horror that arises against the incest of the brother with the sister should proceed from the same source. The desire of fathers and mothers to preserve the morals of their children and families untainted is sufficient to inspire their offspring with a detestation of everything that can lead to the union of the two sexes.

The prohibition of marriage between cousins-german has the same origin. In the early ages, that is, in the times of innocence; in the ages when luxury was unknown it was customary for children *i* upon their marriage not to remove from their parents, but settle in the same house; as a small habitation was at that time sufficient for a large family; the children of two brothers, or cousins-german,*j* were considered both by others and themselves as brothers. The estrangement then between the brothers and sisters as to marriage subsisted also between the cousins-german.*k* These principles are so strong and so natural that they have had their influence almost over all the earth, independently of any communication. It was not the Romans who taught the inhabitants of Formosa,*l* that the marriage of relatives of the fourth degree was incestuous; it was not the Romans that communicated this sentiment to the Arabs; *m* it was not they who taught it to the inhabitants of the Maldivian islands.*n*

But if some nations have not rejected marriages between fathers and children, sisters and brothers, we have seen in the first book, that intelligent beings do always follow the law of nature. Who could have imagined it! Religious ideas have frequently

i It was thus among the ancient Romans.

j Among the Romans they had the same name; the cousins-german were called brothers.

k It was thus at Rome in the first ages, till the people made a law to permit them; they were willing to favor a man extremely popular, who had married his cousin-german.—Plutarch's treatise entitled "Questions concerning the affairs of the Romans."

l "Collection of Voyages to the Indies," vol. v. part I. An account of the state of the isle of Formosa.

m Koran, chapter "on Women."

n See Francis Pirard.

made men fall into these mistakes. If the Assyrians and the Persians married their mothers, the first were influenced by a religious respect for Semiramis, and the second did it because the religion of Zoroaster gave a preference to these marriages.o If the Egyptians married their sisters, it proceeded from the wildness of the Egyptian religion, which consecrated these marriages in honor of Isis. As the spirit of religion leads us to attempt whatever is great and difficult, we cannot infer that a thing is natural from its being consecrated by a false religion.

The principle which informs us that marriages between fathers and children, between brothers and sisters, are prohibited in order to preserve natural modesty in families will help us to the discovery of those marriages that are forbidden by the law of nature, and of those which can be so only by the civil law.

As children dwell, or are supposed to dwell in their father's house, and consequently the son-in-law with the mother-in-law, the father-in-law with the daughter-in-law, or wife's daughter, the marriage between them is forbidden by the law of nature. In this case the resemblance has the same effect as the reality, because it springs from the same cause; the civil law neither can, nor ought to permit these marriages.

There are nations, as we have already observed, among whom cousins-german are considered as brothers, because they commonly dwell in the same house; there are others where this custom is not known. Among the first the marriage of cousins-german ought to be regarded as contrary to nature; not so among the others.

But the laws of nature cannot be local. Therefore, when these marriages are forbidden or permitted, they are, according to the circumstances, permitted or forbidden by a civil law.

It is not a necessary custom for the brother-in-law and the sister-in-law to dwell in the same house. The marriage between them is not then prohibited to preserve chastity in the family; and the law which forbids or permits it is not a law of nature, but a civil law, regulated by circumstances and dependent on the customs of each country: these are cases in which the laws depend on the morals, or customs of the inhabitants.

The civil laws forbid marriages when by the customs received

o They were considered as more honorable. See Philo, "de specialibus legib. quæ pertinet ad præcepta decalogi." Paris 1640, p. 778.

in a certain country they are found to be in the same circumstances as those forbidden by the law of nature; and they permit them when this is not the case. The prohibitions of the laws of nature are invariable, because the thing on which they depend is invariable; the father, the mother, and the children necessarily dwell in the same house. But the prohibitions of the civil laws are accidental, because they depend on an accidental circumstance, cousins-german and others dwelling in the house by accident.

This explains why the laws of Moses, those of the Egyptians,[p] and of many other nations permitted the marriage of the brother-in-law with the sister-in-law; whilst these very marriages were disallowed by other nations.

In the Indies they have a very natural reason for admitting this sort of marriages. The uncle is there considered as the father and is obliged to maintain and educate his nephew as if he were his own child; this proceeds from the disposition of this people, which is good-natured and full of humanity. This law or this custom has produced another; if a husband has lost his wife, he does not fail to marry her sister:[q] which is extremely natural, for his new consort becomes the mother of her sister's children, and not a cruel step-mother.

15.—*That we should not regulate by the Principles of political Laws those Things which depend on the Principles of civil Law*

As men have given up their natural independence to live under political laws, they have given up the natural community of goods to live under civil laws.

By the first, they acquired liberty; by the second, property. We should not decide by the laws of liberty, which, as we have already said, is only the government of the community, what ought to be decided by the laws concerning property. It is a paralogism to say, that the good of the individual should give way to that of the public; this can never take place, except when the government of the community, or, in other words, the liberty of the subject is concerned; this does not affect such cases as relate to private property, because the public good consists in every-

[p] See Law 8, of the Code "de incestis et inutilibus nuptiis."

[q] "Edifying Letters," 4th, 403.

one's having his property, which was given him by the civil laws, invariably preserved.

Cicero maintains, that the Agrarian laws were unjust; because the community was established with no other view than that everyone might be able to preserve his property.

Let us, therefore, lay down a certain maxim, that whenever the public good happens to be the matter in question, it is not for the advantage of the public to deprive an individual of his property, or even to retrench the least part of it by a law, or a political regulation. In this case we should follow the rigor of the civil law, which is the palladium of property.

Thus when the public has occasion for the estate of an individual, it ought never to act by the rigor of political law; it is here that the civil law ought to triumph, which, with the eyes of a mother, regards every individual as the whole community.

If the political magistrate would erect a public edifice, or make a new road, he must indemnify those who are injured by it; the public is in this respect like an individual who treats with an individual. It is fully enough that it can oblige a citizen to sell his inheritance, and that it can strip him of the great privilege, which he holds from the civil law, of not being forced to alienate his possessions.

After the nations which subverted the Roman Empire had abused their very conquests, the spirit of liberty called them back to that of equity. They exercised the most barbarous laws with moderation: and if any one should doubt the truth of this, they need only read Beaumanoir's admirable work on jurisprudence, written in the twelfth century.

They mended the highways in his time as we do at present. He says, that when a highway could not be repaired, they made a new one as near the old as possible; but indemnified the proprietors at the expense of those who reaped any advantage from the road.[r] They determined at that time by the civil law; in our days, we determine by the law of politics.

[r] "The lord appointed collectors to receive the toll from the peasant, the gentlemen were obliged to contribute by the count, and the clergy to the bishop."—Beaumanoir, chap. xxii.

16.—*That we ought not to decide by the Rules of the civil Law when it is proper to decide by those of the political Law*

Most difficulties on this subject may be easily solved by not confounding the rules derived from property with those which spring from liberty.

Is the demesne of a state or government alienable, or is it not? This question ought to be decided by the political law, and not by the civil. It ought not to be decided by the civil law, because it is as necessary that there should be demesnes for the subsistence of a state, as that the state should have civil laws to regulate the disposal of property.

If then they alienate the demesne, the state will be forced to make a new fund for another. But this expedient overturns the political government, because, by the nature of the thing, for every demesne that shall be established, the subject will always be obliged to pay more, and the sovereign to receive less; in a word, the demesne is necessary, and the alienation is not.

The order of succession is, in monarchies, founded on the welfare of the state; this makes it necessary that such an order should be fixed to avoid the misfortunes, which I have said must arise in a despotic kingdom, where all is uncertain, because all is arbitrary.

The order of succession is not fixed for the sake of the reigning family; but because it is the interest of the state that it should have a reigning family. The law which regulates the succession of individuals is a civil law, whose view is the interest of individuals; that which regulates the succession to monarchy is a political law, which has in view the welfare and preservation of the kingdom.

It follows hence, that when the political law has established an order of succession in government, and this order is at an end, it is absurd to reclaim the succession in virtue of the civil law of any nation whatsoever. One particular society does not make laws for another society. The civil laws of the Romans are no more applicable than any other civil laws. They themselves did not make use of them when they proceeded against kings; and the maxims by which they judged kings are so abominable, that they ought never to be revived.

It follows also hence, that when the political law has obliged

a family to renounce the succession, it is absurd to insist upon the restitutions drawn from the civil law. Restitutions are in the law, and may be good against those who live in the law: but they are not proper for such as have been raised up for the law, and who live for the law.

It is ridiculous to pretend to decide the rights of kingdoms, of nations, and of the whole globe by the same maxims on which (to make use of an expression of Cicero) [s] we should determine the right of a gutter between individuals.

17.—*The same Subject continued*

Ostracism ought to be examined by the rules of politics, and not by those of the civil law; and so far is this custom from rendering a popular government odious, that it is, on the contrary, extremely well adapted to prove its lenity. We should be sensible of this ourselves, if, while banishment is always considered among us as a penalty, we are able to separate the idea of ostracism from that of punishment.

Aristotle [t] tells us, it is universally allowed, that this practice has something in it both humane and popular. If in those times and places where this sentence was executed they found nothing in it that appeared odious; is it for us who see things at such a distance to think otherwise than the accuser, the judges and the accused themselves?

And if we consider that this judgment of the people loaded the person with glory on whom it was passed; that when at Athens it fell upon a man without merit,[u] from that very moment they ceased to use it; [v] we shall find that numbers of people have obtained a false idea of it; for it was an admirable law that could prevent the ill consequences which the glory of a citizen might produce by loading him with new glory.

18.—*That it is necessary to inquire whether the Laws which seem contradictory are of the same Class*

At Rome the husband was permitted to lend his wife to another. Plutarch tells us this in express terms.[w] We know that

[s] Lib. I. "of Laws."
[t] "Repub." lib. III. cap. xiii.
[u] Hyperbolus. See Plutarch, "Life of Aristides."
[v] It was found opposite to the spirit of the legislator.
[w] Plutarch in his "comparison between Lycurgus and Numa."

Cato lent his wife to Hortensius,[x] and Cato was not a man to violate the laws of his country.

On the other hand, a husband who suffered his wife to be debauched, who did not bring her to justice, or who took her again after her condemnation was punished.[y] These laws seem to contradict each other, and yet are not contradictory. The law which permitted a Roman to lend his wife was visibly a Lacedæmonian institution, established with a view of giving the republic children of a good species, if I may be allowed the term; the other had in view the preservation of morals. The first was a law of politics, the second a civil law.

19.—*That we should not decide those Things by the civil Law which ought to be decided by domestic Laws*

The law of the Visigoths enjoins that the slaves of the house shall be obliged to bind the man and woman they surprise in adultery, and to present them to the husband and to the judge;[z] a terrible law, which puts into the hands of such mean persons, the care of public, domestic, and private vengeance!

This law can be nowhere proper but in the seraglios of the East, where the slave who has the charge of the inclosure is deemed an accomplice upon the discovery of the least infidelity. He seizes the criminals, not so much with a view to bring them to justice, as to do justice to himself, and to obtain a scrutiny into the circumstances of the action, in order to remove the suspicion of his negligence.

But, in countries where women are not guarded, it is ridiculous to subject those who govern the family to the inquisition of their slaves.

The inquisition may, in certain cases, be at the most a particular domestic regulation, but never a civil law.

20.—*That we ought not to decide by the Principles of the civil Laws those Things which belong to the Law of Nations*

Liberty consists principally in not being forced to do a thing, where the laws do not oblige: people are in this state only as they are governed by civil laws; and because they live under those civil laws, they are free.

[x] Plutarch, "Life of Cato."

[y] Leg. 11, sec. ult. ff. "ad leg. Jul. de adulteriis."

[z] Law of the Visigoths, lib. III. tit. 4, sec. 6.

It follows hence, that princes who live not among themselves under civil laws are not free; they are governed by force; they may continually force, or be forced. Hence it follows, that treaties made by force are as obligatory as those made by free consent. When we, who live under civil laws, are, contrary to law, constrained to enter into a contract we may, by the assistance of the law, recover from the effects of violence: but a prince, who is always in that state in which he forces, or is forced, cannot complain of a treaty which he has been compelled to sign. This would be to complain of his natural state; it would seem as if he would be a prince with respect to other princes, and as if other princes should be subjects with respect to him; that is, it would be contrary to the nature of things.

21.—*That we should not decide by political Laws Things which belong to the Law of Nations*

Political laws demand that every man be subject to the natural and civil courts of the country where he resides, and to the censure of the sovereign.

The law of nations requires that princes shall send ambassadors; and a reason drawn from the nature of things does not permit these ambassadors to depend either on the sovereign to whom they are sent, or on his tribunals. They are the voice of the prince who sends them, and this voice ought to be free; no obstacle should hinder the execution of their office: they may frequently offend, because they speak for a man entirely independent; they might be wrongfully accused, if they were liable to be punished for crimes; if they could be arrested arrested for debts, these might be forged. Thus a prince, who has naturally a bold and enterprising spirit, would speak by the mouth of a man who had everything to fear. We must then be guided, with respect to ambassadors, by reasons drawn from the law of nations, and not by those derived from political law. But if they make an ill use of their representative character, a stop may be put to it by sending them back. They may even be accused before their master, who becomes either their judge or their accomplice.

22.—*The unhappy state of the Ynca Athualpa*

The principles we have just been establishing were cruelly violated by the Spaniards. The Ynca Athualpa [a] could not be tried by the law of nations: they tried him by political and civil laws; they accused him for putting to death some of his own subjects, for having many wives, etc., and to fill up the measure of their stupidity, they condemned him, not by the political and civil laws of his own country, but by the political and civil laws of theirs.

23.—*That when, by some Circumstance, the political Law becomes destructive to the State, we ought to decide by such a political Law as will preserve it, which sometimes becomes a Law of Nations*

When that political law which has established in the kingdom a certain order of succession becomes destructive to the body politic for whose sake it was established, there is not the least room to doubt but another political law may be made to change this order; and so far would this law be from opposing the first that it would in the main be entirely conformable to it, since both would depend on this principle, that *the safety of the people is the supreme law.*

I have said,[b] that a great state becoming accessory to another is itself weakened, and even weakens the principal. We know that it is for the interest of the state to have the supreme magistrate within itself, that the public revenues be well administered, and that its specie be not sent abroad to enrich another country. It is of importance that he who is to govern has not imbibed foreign maxims; these are less agreeable than those already established. Besides, men have an extravagant fondness for their own laws and customs: these constitute the happiness of every community; and, as we learn from the histories of all nations, are rarely changed without violent commotions and a great effusion of blood.

It follows hence, that if a great state has for its heir the possessor of a great state, the former may reasonably exclude him, because a change in the order of succession must be of service to

a See Garcilaso de la Vega, p. 108.

b See book V. chap. xiv.; book VIII. chap. xvi.; 17, 18, 19, and 20, book IX. chap. iv., v. vi., and vii.; and book X. chap. ix. and x.

both countries. Thus a law of Russia, made in the beginning of the reign of Elizabeth, most wisely excluded from the possession of the crown every heir who possessed another monarchy; thus the law of Portugal disqualifies every stranger who lays claim to the crown by right of blood.

But if a nation may exclude, it may with greater reason be allowed a right to oblige a prince to renounce. If the people fear that a certain marriage will be attended with such consequences as shall rob the nation of its independence, or dismember some of its provinces, it may very justly oblige the contractors and their descendants to renounce all right over them; while he who renounces, and those to whose prejudice he renounces, have the less reason to complain, as the state might originally have made a law to exclude them.

24.—*That the Regulations of the Police are of a different Class from other civil Laws*

There are criminals whom the magistrate punishes, there are others whom he reproves. The former are subject to the power of the law, the latter to his authority: those are cut off from society; these they oblige to live according to the rules of society.

In the exercise of the police, it is rather the magistarte who punishes, than the law; in the sentence passed on crimes, it is rather the law which punishes, than the magistrate. The business of the police consists in affairs which arise every instant, and are commonly of a trifling nature: there is then but litttle need of formalties. The actions of the police are quick; they are exercised over things which return every day: it would be therefore improper for it to inflict severe punishments. It is continually employed about minute particulars; great examples are therefore not designed for its purpose. It is governed rather by regulations than laws; those who are subject to its jurisdiction are incessantly under the eye of the magistrate: it is therefore his fault if they fall into excess. Thus we ought not to confound a flagrant violation of the laws, with a simple breach of the police; these things are of a different order.

Hence it follows, that the laws of an Italian republic,[c] where bearing fire-arms is punished as a capital crime and where it is

[c] Venice.

not more fatal to make an ill use of them than to carry them, is not agreeable to the nature of things.

It follows, moreover, that the applauded action of that emperor, who caused a baker to be impaled whom he found guilty of a fraud, was the action of a ruler who knew not how to be just without committing an outrage on justice.

25.—*That we should not follow the general Disposition of the civil Law, in things which ought to be subject to particular Rules drawn from their own Nature*

Is it a good law that all civil obligations passed between sailors in a ship in the course of a voyage should be null? Francis Pirard tells us [d] that, in his time, it was not observed by the Portuguese, though it was by the French. Men who are together only for a short time, who have no wants, since they are provided for by the prince, who have only one object in view, that of their voyage, who are no longer in society, but are only the inhabitants of a ship, ought not to contract obligations that were never introduced but to support the burden of civil society.

In the same spirit was the law of the Rhodians made at a time when they always followed the coasts; it ordained, that those who during a tempest stayed in a vessel should have ship and cargo, and those who quitted it should have nothing.

d Chap. xiv. p. 12.

THE LAOCOÖN.

Photo-engraving from the original marble group in the Vatican, at Rome.

Agesander, Athenodorus and Polydorus, a group of Rhodian masters, produced the Laocoön, which is said to express physical pain and passion better than any other existing group of statuary. Laocoön was a Trojan priest of the Thymbræan Apollo. According to classic legend he was preparing to sacrifice a bull to Poseidon, when two enormous serpents swam out of the sea, coiled round Laocoön and his two sons, and destroyed them. The Laocoön group was discovered in 1506, near the baths of Titus, probably in the ruins of the palace of the Emperor Titus.

BOOK XXVII

1.—*Of the Origin and Revolutions of the Roman Laws on Successions*

THIS affair derives its establishment from the most distant antiquity, and to penetrate to its foundation, permit me to search among the first laws of the Romans for what, I believe, nobody yet has been so happy as to discover.

We know that Romulus [a] divided the land of his little kingdom among his subjects; it seems to me that hence the laws of Rome on successions were derived.

The law of the division of lands made it necessary, that the property of one family should not pass into another: hence it followed, that there were but two orders of heirs established by law, the children and all the descendants that lived under the power of the father, whom they called *sui hæredes*, or his natural heirs; and, in their default, the nearest relatives on the male side, whom they called *agnati*.[b]

It followed likewise, that the relatives on the female side, whom they called *cognati*, ought not to succeed; they would have conveyed the estate into another family, which was not allowed.

Thence also it followed, that the children ought not to succeed to the mother, nor the mother to her children; for this might carry the estate of one family into another. Thus we see them excluded by the law of the Twelve Tables: [c] it called none to the succession but the *agnati*, and there was no agnation between the son and the mother.

But it was indifferent whether the *suus hæres*, or, in default of such, the nearest by agnation, was male or female; because,

a Dionys. Halicar. lib. II. c. iii. Plutarch's "comparison between Numa and Lycurgus."

b "Ast si intestato moritur cui suus hæres nec extabit, agnatus proximus familiam habeto." "Fragment of the law of the Twelve Tables" in Ulpian, the last title.

c See the "Frag. of Ulpian," sec. 8, tit. 26. "Inst." tit. 3, "in præmio ad S. C. Tertullianum."

as the relatives on the mother's side could not succeed, though a woman who was an heiress should happen to marry, yet the estate always returned into the family whence it came. On this account, the law of the Twelve Tables does not distinguish, whether the person who succeeded was male or female.[d]

This was the cause, that though the grandchildren by the son succeeded to the grandfather, the grandchildren by the daughter did not succeed; for, to prevent the estate from passing into another family, the *agnati* were preferred to them. Hence the daughter, and not her children, succeeded to the father.[e]

Thus among the primitive Romans, the women succeeded, when this was agreeable to the law of the division of lands, and they did not succeed, when this might suffer by it.

Such were the laws of succession among the primitive Romans; and as these had a natural dependence on the constitution, and were derived from the division of lands, it is easy to perceive that they had not a foreign origin, and were not of the number of those brought into the republic by the deputies sent into the cities of Greece.

Dionysius Halicarnassus tells us[f] that Servius Tullius, finding the laws of Romulus and Numa on the division of lands abolished, restored them, and made new ones to give the old a greater weight. We cannot, therefore, doubt but that the laws we have been speaking of, made in consequence of this division, were the work of these three Roman legislators.

The order of succession having been established in consequence of a political law, no citizen was allowed to break in upon it by his private will; that is, in the first ages of Rome he had not the power of making a testament. Yet it would have been hard to deprive him, in his last moments, of the friendly commerce of kind and beneficent actions.

They therefore found a method of reconciling, in this respect, the laws with the desires of the individual. He was permitted to dispose of his substance in an assembly of the people; and thus every testament was, in some sort, an act of the legislative power.

The law of the Twelve Tables permitted the person who

d Paulus, lib. IV. sent. tit. 8, sec. 3.
e "Inst." tit. lib. III.
f Lib. IV. p. 276.

made his will to choose which citizen he pleased for his heir. The reason that induced the Roman laws so strictly to restrain the number of those who might succeed *ab intestato* was the law of the division of lands; and the reason why they extended so widely the power of the testator was, that as the father might sell his children,*g* he might with greater reason deprive them of his substance. These were, therefore, different effects, since they flowed from different principles; and such is, in this respect, the spirit of the Roman laws.

The ancient laws of Athens did not suffer a citizen to make a will. Solon permitted it, with an exception to those who had children;*h* and the legislators of Rome, filled with the idea of paternal power, allowed the making a will even to the prejudice of their children. It must be confessed that the ancient laws of Athens were more consistent than those of Rome. The indefinite permission of making a will which had been granted to the Romans, ruined little by little the political regulation on the division of lands; it was the principal thing that introduced the fatal difference between riches and poverty: many shares were united in the same person; some citizens had too much, and a multitude of others had nothing. Thus the people being continually deprived of their shares were incessantly calling out for a new distribution of lands. They demanded it in an age when the frugality, the parsimony, and the poverty of the Romans were their distinguishing characteristics; as well as at a time when their luxury had become still more astonishing.

Testaments being properly a law made in the assembly of the people, those who were in the army were thereby deprived of a testamentary power. The people, therefore, gave the soldiers the privilege of making before their companions *i* the dispositions which should have been made before them.*j*

The great assembly of the people met but twice a year; besides, both the people and the affairs brought before them were

g Dionysius Halicarnassus proves, by a law of Numa, that the law which permitted a father to sell his son three times was made by Romulus, and not by the Decemvirs.—Lib. II.

h See Plutarch's "Life of Solon."

i This testament, called "in procinctu," was different from that which they styled military, which was established only by the constitutions of the emperors. L. 1, 3 ff. "de militari testamento." This was one of the artifices by which they cajoled the soldiers.

j This testament was not in writing and it was without formality, "sine libra et tabulis," as Cicero says, lib. I. "de Oratore."

increased; they, therefore, judged it convenient to permit all the citizens to make their will before some Roman citizens of ripe age, who were to represent the body of the people;[k] they took five citizens,[l] in whose presence the inheritor purchased his family, that is, his inheritance, of the testator;[m] another citizen brought a pair of scales to weigh the value; for the Romans, as yet, had no money.[n]

To all appearance these five citizens were to represent the five classes of the people; and they set no value on the sixth, as being composed of men who had no property.

We ought not to say, with Justinian, that these scales were merely imaginary; they became, indeed, imaginary in time, but were not so originally. Most of the laws, which afterwards regulated wills, were built on the reality of these scales: we find sufficient proof of this in the fragments of Ulpian.* The deaf, the dumb, the prodigal, could not make a will: the deaf, because he could not hear the words of the buyer of the inheritance; the dumb, because he could not pronounce the terms of nomination; the prodigal, because as he was excluded from the management of all affairs, he could not sell his inheritance. I omit any further examples.

Wills being made in the assembly of the people were rather the acts of political than of civil laws, a public rather than a private right; whence it followed, that the father while his son was under his authority could not give him leave to make a will.

Among most nations, wills are not subject to greater formalities than ordinary contracts; because both the one and the other are only expressions of the will of him who makes the contract, and both are equally a private right. But among the Romans, where testaments were derived from the public law they were attended with much greater formalities than other affairs;[o] and this is still the case in those provinces of France which are governed by the Roman law.

Testaments being, as I have said, a law of the people, they ought to be made with the force of a command, and in such

k "Instit." lib. II. tit. 10, sec. 1. Aulus Gellius, lib. XV. cap. xxvii. They called this form of testament "per æs et libram."

l Ulpian, tit. 10, sec. 2.

m Theoph. "Inst." lib. II. tit. 10.

n T. Livy, lib. IV. "nondum argentum signatum erat." He speaks of the time of the siege of Veii.

* Tit. 20, sec. 13.

o "Instit." lib. II. tit. 10, sec. 1.

terms as are called direct and imperative.[p] Hence a rule was formed, that they could neither give nor transmit an inheritance without making use of the imperative words: whence it followed, that they might very justly in certain cases make a substitution;[q] and ordain, that the inheritance should pass to another heir; but that they could never make a fiduciary bequest,[r] that is, charge any one in terms of entreaty to restore an inheritance, or a part of it, to another.

When the father neither instituted his son his heir, nor disinherited him, the will was annulled; but it was valid though he did not disinherit his daughter, nor institute her his heiress. The reason is plain: when he neither instituted nor disinherited his son, he did an injury to his grandson, who might have succeeded *ab intestato* to his father; but in neither instituting nor disinheriting his daughter, he did no injury to his daughter's children, who could not succeed *ab intestato* to their mother, because they were neither *sui hæredes*, nor *agnati*.[s]

The laws of the ancient Romans concerning successions, being formed with the same spirit which dictated the division of lands, did not sufficiently restrain the riches of women; thus a door was left open to luxury, which is always inseparable from this sort of opulence. Between the second and third Punic wars, they began to perceive the evil and made the Voconian law;[t] but as they were induced to this by the most important considerations; as but few monuments have reached us, that take notice of this law, and as it has hitherto been spoken of in a most confused manner, I shall endeavor to clear it up.

Cicero has preserved a fragment, which forbids the instituting a woman an heiress, whether she was married or unmarried.[u]

The epitome of Livy, where he speaks of this law, says no more:[v] it appears from Cicero[w] and St. Augustin,[x] that the

[p] Let Titus be my heir.

[q] Vulgar, pupillary, and exemplary.

[r] Augustus, for particular reasons, first began to authorize the fiduciary bequest, which, in the Roman law, was called "fidei commissum." "Instit." lib. II. tit. 23, "in præmio."

[s] "Ad liberos matris intestatæ hæreditas," leg. 12 Tab., "non pertinebat, quia, feminæ sui hæredes non habent." Ulpian, "Frag." tit. 26, sec. 7.

[t] It was proposed by Quintus Voconius, Tribune of the people. See Cicero's "Second Oration against Verres." In the "Epitome" of T. Livy, lib. XLI., we should read Voconius, instead of Voluminus.

[u] "Sanxit . . . ne quis hæredem virginem neve mulierem faceret."—Cicero's "Second Oration against Verres."

[v] "Legem tulit, ne quis hæredem mulierem institueret."—Lib. IV.

[w] "Second Oration against Verres."

[x] "Of the City of God," bb. III.

daughter, though an only child, was comprehended in the prohibition.

Cato, the elder, contributed all in his power to get this law passed.[y] Aulus Gellius cites a fragment of a speech,[z] which he made on this occasion. By preventing the succession of women, his intent was to take away the source of luxury; as by undertaking the defence of the Oppian law, he intended to put a stop to luxury itself.

In the Institutes of Justinian[a] and Theophilus,[b] mention is made of a chapter of the Voconian law which limits the power of bequeathing. In reading these authors, everybody would imagine that this chapter was made to prevent the inheritance from being so exhausted by legacies as to render it unworthy of the heir's acceptance. But this was not the spirit of the Voconian law. We have just seen, that they had in view the hindering women from inheriting an estate. The article of this law, which set bounds to the power of bequeathing, entered into this view: for if people had been possessed of the liberty to bequeath as much as they pleased, the women might have received as legacies what they could not receive by succession.

The Voconian law was made to hinder the women from growing too wealthy; for this end it was necessary to deprive them of large inheritances, and not of such as were incapable of supporting luxury. The law fixed a certain sum to be given to the women whom it deprived of the succession. Cicero,[c] from whom we have this particular, does not tell us what was the sum; but by Dio we are informed it was a hundred thousand sesterces.[d]

The Voconian law was made to regulate opulence, not to lay a restraint upon poverty; hence Cicero[e] informs us that it related only to those whose names were registered in the censors' books.

This furnished a pretence for eluding the law: it is well known that the Romans were extremely fond of set forms; and we have already taken notice, that it was the spirit of the

y "Epitome" of Livy, lib. XL.
z Lib. XXVII. cap. vi.
a "Instit." lib. III. tit. 22.
b Ibid.
c "Nemo censuit plus Fadiæ dandum, quam posset ad eam lege Voconia pervenire."—"De finibus boni et mali," lib. VI.
d "Cum lege Voconia mulieribus prohiberetur, ne qua majorem centum millibus nummum hæreditatem posset adire."—Lib. LXVI.
e "Qui census esset."—"Second Oration against Verres."

republic to follow the letter of the law. There were fathers who would not give in their names to be enrolled by the Censors, because they would have it in their power to leave the succession to a daughter: and the pretors determined that this was no violation of the Voconian law since it was not contrary to the letter of it.

One Anius Asellus had appointed his daughter his sole heir and executrix. He had a right to make this disposition, says Cicero;[f] he was not restrained by the Voconian law, since he was not included in the census. Verres, during the time of his pretorship, had deprived Anius's daughter of the succession; and Cicero maintains that Verres has been bribed, otherwise he would not have annulled a disposition which all the other pretors had confirmed.

What kind of citizens then must those have been, who were not registered in the census in which all the freemen of Rome were included? According to the institution of Servius Tullius, mentioned by Dionysius of Halicarnassus,[g] every citizen not enrolled in the census became a slave; even Cicero himself observes,[h] that such a man forfeited his liberty, and the same thing is affirmed by Zonaras. There must have been, therefore, a difference between not being in the census according to the spirit of the Voconian law, and not being in it according to the spirit of Servius Tullius's institutions.

They whose names were not registered in the first five classes,[i] in which the inhabitants ranked in proportion to their fortunes, were not comprised in the census according to the spirit of the Voconian law: they who were not enrolled in one of these six classes, or who were not ranked by the Censors among such as were called *ærarii*, were not included in the census according to the spirit of Servius's institutions. Such was the force of nature, that to elude the Voconian law fathers submitted to the disgrace of being confounded in the sixth class with the *proletarii* and *capite censi*, or perhaps to have their names entered in the *Cærites tabulæ*.[j]

We have elsewhere observed that the Roman laws did not admit of fiduciary bequests. The hopes of evading the Vo-

[f] "Census non erat."—Ibid.
[g] Lib. IV.
[h] In "Oratione pro Cæcina."
[i] These five classes were so considerable, that authors sometimes mention no more than five.
[j] "In Cæritum tabulas referri; ærarius fieri."

conian law were the cause of their being introduced: they instituted an heir qualified by the law, and they begged he would resign the succession to a person whom the law had excluded; this new method of disposition was productive of very different effects. Some resigned the inheritance; and the conduct of Sextus Peduccus on an occasion of this nature was very remarkable.[k] A considerable succession was left him, and nobody living knew that he was desired to resign it to another, when he waited upon the widow of the testator and made over to her the whole fortune belonging to her late husband.

Others kept possession of the inheritance; and here the example of P. Sextilius Rufus is also famous, having been made use of by Cicero in his disputations against the Epicureans.[l] "In my younger days," says he, "I was desired by Sextilius to accompany him to his friends, in order to know whether he ought to restore the inheritance of Quintus Fadius Gallus to his daughter Fadia. There were several young people present, with others of more maturity and judgment; and not one of them was of opinion that he should give more to Fadia than the lady was entitled to by the Voconian law. In consequence of this, Sextilius kept possession of a fine estate, of which he would not have retained a single sestertius had he preferred justice to utility. It is possible, added he, that you would have resigned the inheritance; nay it is possible that Epicurus himself would have resigned it; but you would not have acted according to your own principles." Here I shall pause a little to reflect.

It is a misfortune inherent in humanity, that legislators should be sometimes obliged to enact laws repugnant to the dictates of nature: such was the Voconian law. The reason is, the legislature considers the society rather than the citizen, and the citizen rather than the man. The law sacrificed both the citizen and the man, and directed its views to the prosperity of the republic. Suppose a person made a fiduciary bequest in favor of his daughter; the law paid no regard to the sentiments of nature in the father, nor to the filial piety of the daughter; all it had an eye to was the person to whom the bequest was made in trust, and who on such occasion found himself in a terrible dilemma. If he restored the estate he was

k Cicero, "de finib. boni et mali," lib. II. *l* Ibid.

a bad citizen; if he kept it he was a bad man. None but good-natured people thought of eluding the law; and they could pitch upon none but honest men to help them to elude it; for a trust of this kind requires a triumph over avarice and inordinate pleasure, which none but honest men are likely to obtain. Perhaps in this light to look upon them as bad citizens would have savored too much of severity. It is not impossible but that the legislator carried his point in a great measure, since his law was of such a nature as obliged none but honest men to elude it.

At the time when the Voconian law was passed, the Romans still preserved some remains of their ancient purity of manners. Their conscience was sometimes engaged in favor of the law; and they were made to swear they would observe it:[m] so that honesty in some measure was set in opposition against itself. But latterly their morals were corrupted to such a degree that the fiduciary bequests must have had less efficacy to elude the Voconian law, than that very legislator had to enforce its observance.

The civil wars were the destruction of an infinite number of citizens. Under Augustus, Rome was almost deserted; it was necessary to re-people it. They made the Papian laws, which omitted nothing that could encourage the citizens to marry, and procreate children.[n] One of the principal means was to increase, in favor of those who gave in to the views of the law, the hopes of being heirs, and to diminish the expectations of those who refused; and as the Voconian law had rendered women incapable of succeeding, the Papian law, in certain cases, dispensed with this prohibition.[o]

Women,[p] especially those who had children, were rendered capable of receiving in virtue of the will of their husbands; they even might, when they had children, receive in virtue of the will of strangers. All this was in direct opposition to the regulations of the Voconian law: and yet it is remarkable, that the spirit of this law was not entirely abandoned. For example, the Papian law, which permitted a man who had one

m Sextilius said he had sworn to observe it.—Cic. "de finibus bonorum et malorum," lib. II.

n See what has been said in book XXIII. chap. 21.

o The same difference occurs in several regulations of the Papian law. See the "Fragments of Ulpian," secs. 4, 5, and 6.

p See "Frag. of Ulpian," tit. 15, sec. 16.

child *q* to receive an entire inheritance by the will of a stranger, granted the same favor to the wife only when she had three children.*r*

It must be remarked, that the Papian law did not render the women who had three children capable of succeeding except in virtue of the will of strangers; and that with respect to the succession of relatives, it left the ancient laws, and particularly the Voconian, in all their force.*s* But this did not long subsist.

Rome, corrupted by the riches of every nation, had changed her manners; the putting a stop to the luxury of women was no longer minded. Aulus Gellius, who lived under Adrian,*t* tells us, that in his time the Voconian law was almost abolished; it was buried under the opulence of the city. Thus we find in the sentences of Paulus,*u* who lived under Niger, and in the fragments of Ulpian,*v* who was in the time of Alexander Severus, that the sisters on the father's side might succeed, and that none but the relatives of a more distant degree were in the case of those prohibited by the Voconian law.

The ancient laws of Rome began to be thought severe. The pretors were no longer moved except by reasons of equity, moderation, and decorum.

We have seen, that by the ancient laws of Rome mothers had no share in the inheritance of their children. The Voconian law afforded a new reason for their exclusion. But the Emperor Claudius gave the mother the succession of her children as a consolation for her loss. The Tertullian *senatus-consultum*, made under Adrian,*w* gave it them when they had three children if free women, or four if they were freed-women. It is evident, that this decree of the Senate was only an extension of the Papian law, which in the same case had granted to women the inheritance left them by strangers. At length Justinian favored them with the succession independently of the number of their children.*x*

q "Quod tibi filiolus, vel filia nascitur ex me,
Jura Parentis habes; propter me scriberis hæres."—Juvenal. Sat. 9.

r See law 9, C. Theod. "de bonis proscriptorum," and Dio, lib. V. See the "Frag. of Ulpian," tit. last, sec. 6, and tit. 29, sec. 3.

s "Fragments of Ulpian," tit. 16, sec. 1. Sozomenus, lib. I. cap. ix.

t Lib. XX. cap. i.

u Lib. IV. tit. 8, sec. 3.

v Tit. 26, sec. 6.

w That is, the Emperor Pius, who changed his name to that of Adrian by adoption.

x Lib. II. cod. "de jure liberorum." "Instit." tit. 3, sec. 4, "de senatus consult."

The same causes which had debilitated the law against the succession of women subverted that, by degrees, which had limited the succession of the relatives on the woman's side. These laws were extremely conformable to the spirit of a good republic, where they ought to have such an influence, as to prevent this sex from rendering either the possession, or the expectation of wealth, an instrument of luxury. On the contrary, the luxury of a monarchy rendering marriage expensive and costly, it ought to be there encouraged, both by the riches which women may bestow, and by the hope of the inheritances it is in their power to procure. Thus when monarchy was established at Rome, the whole system of successions was changed. The pretors called the relatives of the woman's side in default of those of the male side; though by the ancient laws, the relatives on the woman's side were never called. The Orphitian *senatus-consultum* called children to the succession of their mother; and the Emperors Valentinian, Theodosius, and Arcadius called the grandchildren by the daughter to the succession of the grandfather.[y] In short, the Emperor Justinian[z] left not the least vestige of the ancient right of successions: he established three orders of heirs, the descendants, the ascendants, and the collaterals, without any distinction between the males and females; between the relatives on the woman's side, and those on the male side; and abrogated all of this kind, which were still in force: he believed that he followed nature, even in deviating from what he called the embarrassments of the ancient jurisprudence.

y Lib. 9, Cod. "de suis et legitimis hæredibus."

z Lib. XIV. Cod. "de suis et legitimis hæredibus," et "Nov." 118 and 127.

BOOK XXVIII

OF THE ORIGIN AND REVOLUTIONS OF THE CIVIL LAWS AMONG THE FRENCH [a]

In nova fert animus mutatas dicere formas
Corpora———— —OVID, METAM.

I.—*Different Character of the Laws of the several Peoples of Germany*

AFTER the Franks had quitted their own country, they made a compilation of the Salic laws with the assistance of the sages of their own nation.[b] The tribe of the Ripuarian Franks having joined itself under Clovis [c] to that of the Salians preserved its own customs; and Theodoric,[d] King of Austrasia, ordered them to be reduced to writing. He collected likewise the customs of those Bavarians and Germans, who were dependent on his kingdom.[e] For Germany having been weakened by the migration of such a multitude of people, the Franks, after conquering all before them, made a retrograde march and extended their dominion into the forests of their ancestors. Very likely the Thuringian code was given by the same Theodoric, since the Thuringians were also his subjects.[f] As the Frisians were subdued by Charles Martel and Pepin, their law cannot be prior to those princes.[g] Charlemagne, the first that reduced the Saxons, gave them the law still extant; and we need only read these last two codes to be convinced they came from the hands of conquerors. As soon as the Visigoths, the Burgundians, and the Lombards had founded their respective kingdoms, they reduced their laws to writing, not with an intent of obliging the

a In a private letter Montesquieu, speaking of this book, says that it cost him so much labor that his hair turned gray on account of it.—Ed.

b See the prologue to the Salic law. Mr. Leibnitz says, in his treatise of the origin of the Franks, that this law was made before the reign of Clovis: but it could not be before the Franks had quitted Germany, for at that time they did not understand the Latin tongue.

c See Gregory of Tours.

d See the prologue to the law of the Bavarians, and that to the Salic law.

e Ibid.

f "Lex Angliorum Werinorum, hoc est Thuringorum."

g They did not know how to write.

vanquished nations to conform to their customs, but with a design of following them themselves.

There is an admirable simplicity in the Salic and Ripuarian laws, as well as in those of the Alemans, Bavarians, Thuringians, and Frisians. They breathe an original coarseness and a spirit which no change or corruption of manners had weakened. They received but very few alterations, because all those peoples, except the Franks, remained in Germany. Even the Franks themselves laid there the foundation of a great part of their empire, so that they had none but German laws. The same cannot be said of the laws of the Visigoths, of the Lombards, and Burgundians; their character considerably altered from the great change which happened in the character of the peoples after they had settled in their new habitations.

The kingdom of the Burgundians did not last long enough to admit of great changes in the laws of the conquering nation. Gundebald and Sigismond, who collected their customs, were almost the last of their kings. The laws of the Lombards received additions rather than changes. The laws of Rotharis were followed by those of Grimoaldus, Luitprandus, Rachis, and Astulphus, but did not assume a new form. It was not so with the laws of the Visigoths; [h] their kings new-molded them, and had them also new-molded by the clergy.

The kings, indeed, of the first race struck out of the Salic and Ripuarian laws whatever was absolutely inconsistent with Christianity, but left the main part untouched.[i] This cannot be said of the laws of the Visigoths.

The laws of the Burgundians, and especially those of the Visigoths, admitted of corporal punishments; these were not tolerated by the Salic and Ripuarian laws; [j] they preserved their character much better.

The Burgundians and Visigoths, whose provinces were greatly exposed, endeavored to conciliate the affections of the ancient inhabitants, and to give them the most impartial civil laws; [k] but

h They were made by Euric, and amended by Leovigildus. See Isidorus's chronicle. Chaindasuinthus and Recessuinthus reformed them. Egigas ordered the code now extant to be made, and commissioned bishops for that purpose; nevertheless the laws of Chaindasuinthus and Recessuinthus were preserved, as appears by the Sixth Council of Toledo.

i See the prologue to the law of the Bavarians.

j We find only a few in Childebert's decree.

k See the prologue to the code of the Burgundians, and the code itself, especially the 12th tit. sec. 5, and tit. 38. See also Gregory of Tours, book VI. chap. xxxiii., and the code of the Visigoths.

as the kings of the Franks had established their power, they had no such considerations.[l]

The Saxons, who lived under the dominion of the Franks, were of an intractable temper, and prone to revolt. Hence we find in their laws the severities of a conqueror,[m] which are not to be met with in the other codes of the laws of the barbarians.

We see the spirit of the German laws in the pecuniary punishments, and the spirit of a conqueror in those of an afflictive nature.

The crimes they commit in their own country are subject to corporal punishment; and the spirit of the German laws is followed only in the punishment of crimes committed beyond the extent of their own territory.

They are plainly told that their crimes shall meet with no mercy, and they are refused even the asylum of churches.

The bishops had an immense authority at the court of the Visigoth kings, the most important affairs being debated in councils. All the maxims, principles, and views of the present inquisition are owing to the code of the Visigoths; and the monks have only copied against the Jews the laws formerly enacted by bishops.

In other respects the laws of Gundebald for the Burgundians seem pretty judicious; and those of Rotharis, and of the other Lombard princes, are still more so. But the laws of the Visigoths, those for instance of Recessuinthus, Chaindasuinthus, and Egigas are puerile, ridiculous, and foolish; they attain not their end; they are stuffed with rhetoric and void of sense, frivolous in the substance and bombastic in the style.

2.—*That the Laws of the Barbarians were all personal*

It is a distinguishing character of these laws of the barbarians that they were not confined to a certain district; the Frank was tried by the law of the Franks, the Aleman by that of the Alemans, the Burgundian by that of the Burgundians, and the Roman by the Roman law; nay, so far were the conquerors in those days from reducing their laws to a uniform system or body, that they did not even think of becoming legislators to the people they had conquered.

The original of this I find in the manners of the Germans.

l See lower down, chap. 3.

m See chap. ii. secs. 8 and 9, and chap. iv. secs. 2 and 7.

These people were parted asunder by marshes, lakes, and forests; and Cæsar observes,[n] they were fond of such separations. Their dread of the Romans brought about their reunion; and yet each individual among these mixed people was still to be tried by the established customs of his own nation. Each tribe apart was free and independent; and when they came to be intermixed, the independency still continued; the country was common, the government peculiar; the territory the same, and the nations different. The spirit of personal laws prevailed therefore among those people before ever they set out from their own homes, and they carried it with them into the conquered provinces.

We find this custom established in the formulas of Marculfus,[o] in the codes of the laws of the barbarians, but chiefly in the law of the Ripuarians [p] and the decrees of the kings of the first race,[q] whence the capitularies on that subject in the second race were derived.[r] The children followed the laws of their father,[s] the wife that of her husband,[t] the widow came back to her own original law,[u] and the freedman was under that of his patron.[v] Besides, every man could make choice of what laws he pleased; but the constitution of Lotharius I [w] required that this choice should be made public.

3.—*Capital Difference between the Salic Laws and those of the Visigoths and Burgundians*

We have already observed that the laws of the Burgundians and Visigoths were impartial; but it was otherwise with regard to the Salic law, for it established between the Franks and Romans the most mortifying distinctions. When a Frank, a barbarian, or one living under the Salic law happened to be killed, a composition of 200 sols was to be paid to his relatives; [x] only 100 upon the killing of a Roman proprietor,[y] and no more than forty-five for a Roman tributary. The composition for the murder of one of the king's vassals, if a Frank, was 600

[n] "De bello Gallico," lib. VI.
[o] Lib. I. formul. 8.
[p] Chap. xxxi.
[q] That of Clotarius in the year 560, in the edition of the Capitularies of Baluzius, vol. i. art. 4, ib. "in fine."
[r] Capitularies added to the law of the Lombards, lib. I. tit. 25, cap. lxxi. lib. II. tit. 41, cap. vii. and tit. 56, cap. i. and ii.
[s] Ibid.
[t] Ibid. lib. VI. tit. 7, cap. i.
[u] Ibid. cap. ii.
[v] Ibid. lib. II. tit. 35, cap. ii.
[w] In the law of the Lombards, lib. II. tit. 57.
[x] Salic law, tit. 44, sec. 1.
[y] "Qui res in pago ubi remanet proprias habet."—Salic law, tit. 44, sec. 15.

sols;[z] if a Roman, though the king's guest,[a] only 300.[b] The Salic law made therefore a cruel distinction between the Frank and Roman lord, and the Frank and Roman commoner.

Further, if a number of people were got together to assault a Frank in his house,[c] and he happened to be killed, the Salic law ordained a composition of 600 sols; but if a Roman or a freedman was assaulted, only one-half that composition.[d] By the same law,[e] if a Roman put a Frank in irons, he was liable to a composition of 30 sols; but if a Frank had thus used a Roman, he paid only 15. A Frank, stripped by a Roman, was entitled to the composition of 62½ sols, and a Roman stripped by a Frank received only 30. Such unequal treatment must needs have been very grievous to a Roman.

And yet a celebrated author[f] forms a system of the establishment of the Franks in Gaul, on a supposition that they were the best friends of the Romans. The Franks then, the best friends of the Romans, they who did, and they who suffered from the Romans such an infinite deal of mischief![g] The Franks, the friends of the Romans, they who, after subduing them by their arms, oppressed them in cold blood by their laws! They were exactly the friends of the Romans as the Tartars who conquered China were the friends of the Chinese.

If some Catholic bishops thought fit to make use of the Franks in destroying the Arian kings, does it follow that they had a desire of living under those barbarous people? And can we hence conclude that the Franks had any particular regard for the Romans? I should draw quite different consequences; the less the Franks had to fear from the Romans, the less indulgence they showed them.

The Abbé du Bos has consulted but indifferent authorities for his history, such as poets and orators; works of parade and ostentation are improper foundations for building systems.

z "Qui in truste dominicâ est."—Ibid. tit. 41, sec. 4.

a "Si Romanus homo conviva regis fuerit."—Ibid. sec. 6.

b The principal Romans followed the court, as may be seen by the lives of several bishops, who were there educated; there were hardly any but Romans that knew how to write.

c Salic law, tit. 45.

d Lidus whose condition was better than that of a bondsman.—Law of the Alemans, chap. xcv.

e Tit. 35, secs. 3 and 4.

f The Abbé du Bos.

g Witness the expedition of Arbogastes, in Gregory of Tours, "Hist." lib. II.

4.—*In what manner the Roman Law came to be lost in the Country subject to the Franks, and preserved in that subject to the Goths and Burgundians*

What has been above said will throw some light upon other things, which have hitherto been involved in great obscurity.

The country at this day called France was under the first race governed by the Roman law, or the Theodosian code, and by the different laws of the barbarians,[h] who settled in those parts.

In the country subject to the Franks the Salic law was established for the Franks, and the Theodosian code[i] for the Romans. In that subject to the Visigoths, a compilation of the Theodosian code, made by order of Alaric,[j] regulated disputes among the Romans; and the national customs, which Euric caused to be reduced to writing,[k] determined those among the Visigoths. But how comes it, some will say, that the Salic laws gained almost a general authority in the country of the Franks, and the Roman law gradually declined; whilst in the jurisdiction of the Visigoths the Roman law spread itself, and obtained at last a general sway?

My answer is, that the Roman law came to be disused among the Franks because of the great advantages accruing from being a Frank, a barbarian,[l] or a person living under the Salic law; everyone, in that case, readily quitting the Roman to live under the Salic law. The clergy alone retained it,[m] as a change would be of no advantage to them. The difference of conditions and ranks consisted only in the largeness of the composition, as I shall show in another place. Now particular laws[n] allowed the clergy as favorable compositions as those of the Franks, for which reason they retained the Roman law. This law brought no hard-

h The Franks, the Visigoths, and Burgundians.

i It was finished in 438.

j The 20th year of the reign of this prince, and published two years after by Anian, as appears from the preface to that code.

k The year 504, of the Spanish era, the "Chronicle of Isidorus."

l "Francum, aut Barbarum, aut hominem qui Salica lege vivit."—Salic law, tit. 44, sec. 1.

m "According to the Roman law under which the church lives," as is said in the law of the Ripuarians, tit. 58, sec. 1. See also the numberless authorities on this head pronounced by Du Cange, under the words "Lex Romana."

n See the Capitularies added to the Salic law in Lindembrock, at the end of that law, and the different codes of the laws of the barbarians concerning the privileges of ecclesiastics in this respect. See also the letter of Charlemagne to his son Pepin, King of Italy, in the year 807, in the edition of Baluzius, tom. I. 462, where it is said, that an ecclesiastic should receive a triple compensation; and the "Collection of the Capitularies," lib. V. art. 302, tom. i., edition of Baluzius.

ships upon them; and in other respects it was properest for them, as it was the work of Christian emperors.

On the other hand, in the patrimony of the Visigoths, as the Visigoth law *o* gave no civil advantages to the Visigoths over the Romans, the latter had no reason to discontinue living under their own law in order to embrace another. They retained therefore their own laws, without adopting those of the Visigoths.

This is still further confirmed in proportion as we proceed in our inquiry. The law of Gundebald was extremely impartial, not favoring the Burgundians more than the Romans. It appears by the preamble to that law that it was made for the Burgundians, and to regulate the disputes which might arise between them and the Romans; and in the latter case the judges were equally divided of a side. This was necessary for particular reasons, drawn from the political regulations of those times.*p* The Roman law was continued in Burgundy, in order to regulate the disputes of Romans among themselves. The latter had no inducement to quit their own law, as in the country of the Franks; and rather as the Salic law was not established in Burgundy, as appears by the famous letter which Agobard wrote to Louis the Pious.

Agobard *q* desired that prince to establish the Salic law in Burgundy; consequently it had not been established there at that time. Thus the Roman law did, and still does subsist in so many provinces, which formerly depended on this kingdom.

The Roman and Gothic laws continued likewise in the country of the establishment of the Goths, where the Salic law was never received. When Pepin and Charles Martel expelled the Saracens, the towns and provinces which submitted to these princes petitioned for a continuance of their own laws and obtained it; *r* this, in spite of the usages of those times, when all laws were personal, soon made the Roman law to be considered as a real and territorial law in those countries.

This appears by the edict of Charles the Bald, given at Pistes

o See that law.

p Of this I shall speak in another place, book XXX. chaps. 6, 7, 8, and 9.

q Agob. "Opera."

r See Gervaise de Tilbury, in Duchesne's "Collection," tom. iii. p. 366. Facta pactione cum Francis, quod illic Gothi patriis legibus, moribus paternis vivant. Et sic Narbonensis provincia Pippino subjicitur. And a chronicle of the year 759, produced by Catel, "Hist. of Languedoc." And the uncertain author of the "Life of Louis the Debonnaire," upon the demand made by the people of Septimania, at the assembly in Carisiaco, in Duchesne's "Collection," tom. ii. p. 316.

in the year 864, which distinguishes the countries where causes were decided by the Roman law from where it was otherwise.[s]

The edict of Pistes shows two things; one, that there were countries where causes were decided by the Roman law, and others where they were not; and the other, that those countries where the Roman law obtained were precisely the same where it is still followed at this very day, as appears by the said edict:[t] thus the distinction of the provinces of France under custom and those under written law was already established at the time of the edict of Pistes.

I have observed, that in the beginning of the monarchy all laws were personal; and thus when the edict of Pistes distinguishes the countries of the Roman law from those which were otherwise, the meaning is, that in countries which were not of the Roman law, such a multitude of people had chosen to live under some or other of the laws of the barbarians that there were scarcely any who would be subject to the Roman law; and that in the countries of the Roman law there were few who would choose to live under the laws of the barbarians.

I am not ignorant that what is here advanced will be reckoned new; but if the things which I assert be true, surely they are very ancient. After all, what great matter is it, whether they come from me, from the Valesiuses, or from the Bignons?

5.—*The same Subject continued*

The law of Gundebald subsisted a long time among the Burgundians, in conjunction with the Roman law; it was still in use under Louis the Pious, as Agobard's letter plainly evinces. In like manner, though the edict of Pistes calls the country occupied by the Visigoths the country of the Roman law, yet the law of the Visigoths was always in force there; as appears by the synod of Troyes held under Louis the Stammerer, in the year 878, that is, fourteen years after the edict of Pistes.

In process of time the Gothic and Burgundian laws fell into disuse even in their own country, which was owing to those general causes that everywhere suppressed the personal laws of the barbarians.

s "In illa terra in qua judicia secundum legem Romanam terminantur, secundum ipsam legem judicetur; et in illa terra in qua," etc., art 16. See also art. 20.

t See art. 12 and 16 of the "Edict of Pistes," "in Cavilono," "in Narbona," etc.

6.—*How the Roman Law kept its Ground in the Demesne of the Lombards*

The facts all coincide with my principles. The law of the Lombards was impartial, and the Romans were under no temptation to quit their own for it. The motive which prevailed with the Romans under the Franks to make choice of the Salic law did not take place in Italy; hence the Roman law maintained itself there, together with that of the Lombards.

It even fell out, that the latter gave way to the Roman institutes, and ceased to be the law of the ruling nation; and though it continued to be that of the principal nobility, yet the greatest part of the cities formed themselves into republics, and the nobility moldered away of themselves, or were destroyed.[u] The citizens of the new republics had no inclination to adopt a law which established the custom of judiciary combats, and whose institutions retained much of the customs and usages of chivalry. As the clergy of those days, a clergy even then so powerful in Italy, lived almost all under the Roman law, the number of those who followed the institutions of the Lombards must have daily diminished.

Besides, the institutions of the Lombards had not that extent, that majesty of the Roman law, by which Italy was reminded of her universal dominion. The institutions of the Lombards and the Roman law could be then of no other use than to furnish out statutes for those cities that were erected into republics. Now which could better furnish them, the institutions of the Lombards that determined on some particular cases, or the Roman law which embraced them all?

7.—*How the Roman Law came to be lost in Spain*

Things happened otherwise in Spain. The law of the Visigoths prevailed, and the Roman law was lost. Chaindasuinthus[v] and Recessuinthus proscribed the Roman laws,[w] and even forbade citing them in their courts of judicature. Recessuinthus was likewise author of the law which took off the pro-

u See what Machiavel says of the ruin of the ancient nobility of Florence.

v He began to reign in the year 642.

w We will no longer be harassed either by foreign or by the Roman laws.—Law of the Visigoths, lib. II. tit. 1, secs. 9 and 10.

hibition of marriage between the Goths and Romans.[x] It is evident that these two laws had the same spirit; this king wanted to remove the principal causes of separation which subsisted between the Goths and the Romans. Now it was thought that nothing made a wider separation than the prohibition of intermarriages, and the liberty of living under different institutions.

But though the kings of the Visigoths had proscribed the Roman law, it still subsisted in the demesnes they possessed in South Gaul.[y] These countries being distant from the centre of the monarchy lived in a state of great independence. We see from the history of Vamba, who ascended the throne in 672, that the natives of the country had become the prevailing party.[z] Hence the Roman law had greater authority and the Gothic less. The Spanish laws neither suited their manners nor their actual situation: the people might likewise be obstinately attached to the Roman law, because they had annexed to it the idea of liberty. Besides, the laws of Chaindasuinthus and of Recessuinthus contained most severe regulations against the Jews; but these Jews had a vast deal of power in South Gaul. The author of the history of King Vamba calls these provinces the brothel of the Jews. When the Saracens invaded these provinces, it was by invitation; and who could have invited them but the Jews or the Romans? The Goths were the first that were oppressed, because they were the ruling nation. We see in Procopius, that during their calamities they withdrew out of Narbonne Gaul into Spain.[a] Doubtless, under this misfortune, they took refuge in those provinces of Spain which still held out; and the number of those who in South Gaul lived under the law of the Visigoths was thereby greatly diminished.

8.—*A false Capitulary*

Did not that wretched compiler Benedictus Levita attempt to transform this Visigoth establishment, which prohibited the use

[x] "Ut tam Gotho Romanam, quam Romano Gotham matrimonio liceat sociari." "Law of the Visigoths, lib. III. tit. I. chap. i.

[y] See Liv. IV. 19 and 26.

[z] The revolt of these provinces was a general defection, as appears by the sentence in the sequel of the history. Paulus and his adherents were Romans; they were even favored by the bishops. Vamba durst not put to death the rebels whom he had quelled. The author of the history calls Narbonne Gaul the nursery of treason.

[a] "Gothi, qui cladi superfuerant, ex Gallia cum uxoribus liberisque egressi, in Hispaniam ad Teudim jam palam tyrannum se receperunt." "De Bello Gothorum," lib. I. chap. xiii.

of the Roman law, into a capitulary [b] ascribed since to Charlemagne? He made of this particular institution a general one, as if he intended to exterminate the Roman law throughout the universe.

9.—*In what manner the Codes of Barbarian Laws, and the Capitularies came to be lost*

The Salic, the Ripuarian, Burgundian, and Visigoth laws came, by degrees, to be disused among the French in the following manner:

As fiefs became hereditary, and *arrière*-fiefs extended, many usages were introduced, to which these laws were no longer applicable. Their spirit, indeed, was continued, which was, to regulate most disputes by fines. But as the value of money was, doubtless, subject to change, the fines were also changed; and we see several charters,[c] where the lords fixed the fines, that were payable in their petty courts. Thus the spirit of the law was followed, without adhering to the law itself.

Besides, as France was divided into a number of petty lordships, which acknowledged rather a feudal than a political dependence, it was very difficult for only one law to be authorized. And, indeed, it would be impossible to see it observed. The custom no longer prevailed of sending extraordinary officers [d] into the provinces, to inspect the administration of justice, and political affairs; it appears, even by the charters, that when new fiefs were established our kings divested themselves of the right of sending those officers. Thus, when almost everything had become a fief, these officers could not be employed; there was no longer a common law because no one could enforce the observance of it.

The Salic, Burgundian, and Visigoth laws were, therefore, extremely neglected at the end of the second race; and at the beginning of the third they were scarcely ever mentioned.

Under the first and second race, the nation was often assembled; that is, the lords and bishops; the commons were not yet thought of. In these assemblies, attempts were made to regulate the clergy, a body which formed itself, if I may so speak,

b Capitularies, lib. VI. chap. cclxix. of the year 1613, edition of Baluzius, p. 1021.

c M. de la Thaumassière has collected many of them. See, for instance, chaps. lxi., lxvi., and others.

d "Missi Dominici."

under the conquerors, and established its privileges. The laws made in these assemblies are what we call the Capitularies. Hence four things ensued: the feudal laws were established and a great part of the church revenues was administered by those laws; the clergy effected a wider separation, and neglected those decrees of reformation where they themselves were not the only reformers;[e] a collection was made of the canons of councils and of the decretals of popes;[f] and these the clergy received, as coming from a purer source. Ever since the erection of the grand fiefs, our kings, as we have already observed, had no longer any deputies in the provinces to enforce the observance of their laws; and hence it is, that, under the third race, we find no more mention made of Capitularies.

10.—*The same Subject continued*

Several Capitularies were added to the law of the Lombards, as well as to the Salic and Bavarian laws. The reason of this has been a matter of inquiry; but it must be sought for in the thing itself. There were several sorts of Capitularies. Some had relation to political government, others to economical, most of them to ecclesiastical polity, and some few to civil government. Those of the last species were added to the civil law, that is, to the personal laws of each nation; for which reason it is said in the Capitularies, that there is nothing stipulated therein contrary to the Roman law.[g] In effect, those Capitularies regarding economical, ecclesiastical, or political government had no relation to that law; and those concerning civil government had reference only to the laws of the barbarous people, which were explained, amended, enlarged, or abridged. But the adding of these Capitularies to the personal laws occasioned, I imagine, the neglect of the very body of the Capitularies themselves; in times of ignorance, the abridgment of a work often causes the loss of the work itself.

[e] Let not the bishops, says Charles the Bald, in the Capitulary of 844, art. 8, under pretence of the authority of making canons, oppose this constitution, or neglect the observance of it. It seems he already foresaw the fall thereof.

[f] In the collection of canons a vast number of the decretals of the popes were inserted; they were very few in the ancient collection. Dionysius Exiguus put a great many into his; but that of Isidorus Mercator was stuffed with genuine and spurious decretals. The old collection obtained in France till Charlemagne. This prince received from the hand of Pope Adrian I the collection of Dionysius Exiguus, and caused it to be accepted. The collection of Isidorus Mercator appeared in France about the reign of Charlemagne; people grew passionately fond of it: to this succeeded what we now call "the course of canon law."

[g] See the Edict of Pistes, art. 70.

11.—*Other Causes of the Disuse of the Codes of Barbarian Laws, as well as of the Roman Law, and of the Capitularies*

When the German nations subdued the Roman Empire, they learned the use of writing; and, in imitation of the Romans, they wrote down their own usages, and digested them into codes.[h] The unhappy reigns which followed that of Charlemagne, the invasions of the Normans, and the civil wars, plunged the conquering nations again into the darkness out of which they had emerged, so that reading and writing were quite neglected. Hence it is, that in France and Germany the written laws of the barbarians, as well as the Roman law and the Capitularies fell into oblivion. The use of writing was better preserved in Italy, where reigned the popes and the Greek emperors, and where there were flourishing cities, which enjoyed almost the only commerce in those days. To this neighborhood of Italy it was owing, that the Roman law was preserved in the provinces of Gaul, formerly subject to the Goths and Burgundians; and so much the more, as this law was there a territorial institution, and a kind of privilege. It is probable, that the disuse of the Visigoth laws in Spain proceeded from the want of writing, and, by the loss of so many laws, customs were everywhere established.

Personal laws fell to the ground. Compositions, and what they call *Freda*,[i] were regulated more by custom than by the text of these laws. Thus, as in the establishment of the monarchy, they had passed from German customs to written laws; some ages after, they came back from written laws to unwritten customs.

12.—*Of local Customs. Revolution of the Laws of barbarous Nations, as well as of the Roman Law*

By several memorials it appears, that there were local customs, as early as the first and second race. We find mention made of the "custom of the place," [j] of the "ancient usage," [k]

h This is expressly set down in some preambles to these codes: we even find in the laws of the Saxons and Frisians different regulations, according to the different districts. To these usages were added some particular regulations suitable to the exigency of circumstances; such were the severe laws against the Saxons.

i Of this I shall speak elsewhere (chap. 14, book XXX.).

j Preface to Marculfus's "Formulæ."

k Law of the Lombards, book II. tit. 58, sec. 3.

of "custom," *l* of "laws," *m* and of "customs." It has been the opinion of some authors, that what went by the name of customs were the laws of the barbarous nations, and what had the appellation of law were the Roman institutes. This cannot possibly be. King Pepin ordained,*n* that wherever there should happen to be no law, custom should be complied with; but that it should never be preferred to the law. Now, to pretend that the Roman law was preferred to the codes of the laws of the barbarians is subverting all memorials of antiquity, and especially those codes of barbarian laws, which constantly affirm the contrary.

So far were the laws of the barbarous nations from being those customs, that it was these very laws, as personal institutions, which introduced them. The Salic law, for instance, was a personal law; but generally, or almost generally, in places inhabited by the Salian Franks, this Salic law, how personal soever, became, in respect to those Salian Franks, a territorial institution, and was personal only in regard to those Franks who lived elsewhere. Now if several Burgundians, Alemans, or even Romans should happen to have frequent disputes, in a place where the Salic law was territorial, they must have been determined by the laws of those people; and a great number of decisions agreeable to some of those laws must have introduced new customs into the country. This explains the constitution of Pepin. It was natural that those customs should affect even the Franks who lived on the spot, in cases not decided by the Salic law; but it was not natural that they should prevail over the Salic law itself.

Thus there were in each place an established law and received customs which served as a supplement to that law when they did not contradict it.

They might even happen to supply a law that was in no way territorial; and to continue the same example, if a Burgundian was judged by a law of his own nation in a place where the Salic law was territorial, and the case happened not to be explicitly mentioned in the very text of this law, there is no manner of doubt but that judgment would have been passed upon him according to the custom of the place.

l Law of the Lombards, book II. tit. 41, sec. 6.

m "Life of St. Leger."

n Law of the Lombards, book II. tit. 41, sec. 6.

In the reign of King Pepin, the customs then established had not the same force as the laws; but it was not long before the laws gave way to the customs. And as new regulations are generally remedies that imply a present evil, it may well be imagined that as early as Pepin's time, they began to prefer the customs to the established laws.

What has been said sufficiently explains the manner in which the Roman law began so very early to become territorial, as may be seen in the edict of Pistes; and how the Gothic law continued still in force, as appears by the synod of Troyes above mentioned.[o] The Roman had become the general personal law, and the Gothic the particular personal law; consequently the Roman law was territorial. But how came it, some will ask, that the personal laws of the barbarians fell everywhere into disuse, while the Roman law was continued as a territorial institution in the Visigoth and Burgundian provinces? I answer, that even the Roman law had very nearly the same fate as the other personal institutions; otherwise we would still have the Theodosian code in those provinces where the Roman law was territorial, whereas we have the Institutes of Justinian. Those provinces retained scarcely anything more than the name of the country under the Roman, or written law, than the natural affection which people have for their own institutions, especially when they consider them as privileges, and a few regulations of the Roman law which were not yet forgotten. This was, however, sufficient to produce such an effect, that when Justinian's compilation appeared, it was received in the provinces of the Gothic and Burgundian demesne as a written law, whereas it was admitted only as written reason in the ancient demesne of the Franks.

13.—*Difference between the Salic law, or that of the Salian Franks, and that of the Ripuarian Franks and other barbarous Nations.*

The Salic law did not allow of the custom of negative proofs; that is, if a person brought a demand or charge against another, he was obliged by the Salic law to prove it, and it was not sufficient for the second to deny it, which is agreeable to the laws of almost all nations.

o See chap. v.

The law of the Ripuarian Franks had quite a different spirit; [p] it was contended with negative proofs, and the person, against whom a demand or accusation was brought, might clear himself, in most cases, by swearing, in conjunction with a certain number of witnesses, that he had not committed the crime laid to his charge. The number of witnesses who were obliged to swear [q] increased in proportion to the importance of the affair; sometimes it amounted to seventy-two.[r] The laws of the Alemans, Bavarians, Thuringians, Frisians, Saxons, Lombards, and Burgundians were formed on the same plan as those of the Ripuarians.

I observed, that the Salic law did not allow of negative proofs. There was one case, however, in which they were allowed: [s] but even then they were not admitted alone, and without the concurrence of positive proofs. The plaintiff caused witnesses to be heard,[t] in order to ground his action, the defendant produced also witnesses on his side, and the judge was to come at the truth by comparing those testimonies.[u] This practice was vastly different from that of the Ripuarian, and other barbarous laws, where it was customary for the party accused to clear himself by swearing he was not guilty, and by making his relatives also swear that he had told the truth. These laws could be suitable only to a people remarkable for their natural simplicity and candor; we shall see presently that the legislators were obliged to take proper methods to prevent their being abused.

14.—*Another Difference*

The Salic law did not admit of the trial by combat; though it had been received by the laws of the Ripuarians [v] and of almost all the barbarous nations.[w] To me it seems, that the law of combat was a natural consequence, and a remedy of the law which established negative proofs. When an action was brought, and it appeared that the defendant was going to elude

[p] This related to what Tacitus says, that the Germans had general and particular customs.

[q] Law of the Ripuarians, tits. 6, 7, 8, and others.

[r] Ibid. tits. 11, 14, and 17.

[s] It was when an accusation was brought against an antrustio, that is, the king's vassal, who was supposed to be possessed of a greater degree of liberty. See tit. 76 of the "Pactus legis Salicæ."

[t] See 76th tit. of the "Pactus legis Salicæ."

[u] According to the practice now followed in England.

[v] Tit. 31; tit. 57, sec. 2; tit. 59, sec. 4.

[w] See the following note.

it by an oath, what other remedy was left to a military man,[x] who saw himself upon the point of being confounded, than to demand satisfaction for the injury done to him: and even for the attempt of perjury? The Salic law, which did not allow the custom of negative proofs, neither admitted nor had any need of the trial by combat; but the laws of the Ripuarians [y] and of the other barbarous nations [z] who had adopted the practice of negative proofs, were obliged to establish the trial by combat.

Whoever will please to examine the two famous regulations of Gundebald, King of Burgundy, concerning this subject will find they are derived from the very nature of the thing.[a] It was necessary, according to the language of the barbarian laws, to rescue the oath out of the hands of a person who was going to abuse it.

Among the Lombards, the law of Rotharis admits of cases in which a man who had made his defence by oath should not be suffered to undergo the hardship of a duel. This custom spread itself further:[b] we shall presently see the mischiefs that arose from it, and how they were obliged to return to the ancient practice.

15.—*A Reflection*

I do not pretend to deny that in the changes made in the code of the barbarian laws, in the regulations added to that code, and in the body of the Capitularies, it is possible to find some passages where the trial by combat is not a consequence of the negative proof. Particular circumstances might, in the course of many ages, give rise to particular laws. I speak only of the general spirit of the laws of the Germans, of their nature and origin; I speak of the ancient customs of those people, that were either hinted at or established by those laws; and this is the only matter in question.

x This spirit appears in the law of the Ripuarians, tit. 59, sec. 4, and tit. 67, sec. 5, and in the Capitulary of Louis the Debonnaire, added to the law of the Ripuarians in the year 803, art. 22.

y See that law.

z The law of the Frisians, Lombards, Bavarians, Saxons, Thuringians, and Burgundians.

a In the law of the Burgundians, tit. 8, secs. 1 and 2, on criminal affairs; and tit. 45, which extends also to civil affairs. See also the law of the Thuringians, tit. 1, sec. 31, tit. 7, sec. 6, and tit. 8; and the law of the Alemans, tit. 89; the law of the Bavarians, tit. 8, chap. ii. sec. 6, and chap. iii. sec. 1, and tit. 9, chap. iv. sec. 4; the law of the Frisians, tit. 2, sec. 3, and tit. 14, sec. 4; the law of the Lombards, book I. tit. 32, sec. 3, and tit. 35, sec. 1, and book II. tit. 35, sec. 2.

b See chap. xviii., towards the end.

16.—*Of the Ordeal or Trial by boiling Water, established by the Salic Law*

The Salic law [c] allowed of the ordeal, or trial by boiling water; and as this trial was excessively cruel, the law found an expedient to soften its rigor.[d] It permitted the person, who had been summoned to make the trial with boiling water, to ransom his hand, with the consent of the adverse party. The accuser, for a particular sum determined by the law, might be satisfied with the oath of a few witnesses, declaring that the accused had not committed the crime. This was a particular case, in which the Salic law admitted of the negative proof.

This trial was a thing privately agreed upon, which the law permitted only, but did not ordain. The law gave a particular indemnity to the accuser, who would allow the accused to make his defence by a negative proof: the plaintiff was at liberty to be satisfied with the oath of the defendant, as he was at liberty to forgive him the injury.

The law contrived a middle course,[e] that before sentence passed, both parties, the one through fear of a terrible trial, the other for the sake of a small indemnity, should terminate their disputes, and put an end to their animosities. It is plain, that when once this negative proof was completed, nothing more was requisite; and, therefore, that the practice of legal duels could not be a consequence of this particular regulation of the Salic law.

17.—*Particular Notions of our Ancestors*

It is astonishing that our ancestors should thus rest the honor, fortune, and life of the subject, on things that depended less on reason than on hazard, and that they should incessantly make use of proofs incapable of convicting, and that had no manner of connection either with innocence or guilt.

The Germans, who had never been subdued,[f] enjoyed an excessive independence. Different families waged war with each other [g] to obtain satisfaction for murders, robberies, or affronts. This custom was moderated by subjecting these hostilities to rules; it was ordained that they should be no longer committed

[c] As also some other laws of the barbarians. [d] Tit. 55. [e] Ibid. tit. 56.

[f] This appears by what Tacitus says, "Omnibus idem habitus."

[g] Velleius Paterculus, lib. II. chap. cxviii., says that the Germans decided all their disputes by the sword.

but by the direction and under the eye of the magistrate.[h] This was far preferable to a general license of annoying each other.

As the Turks in their civil wars look upon the first victory as a decision of heaven in favor of the victor, so the inhabitants of Germany in their private quarrels considered the event of a combat as a decree of Providence, ever attentive to punish the criminal or the usurper.

Tacitus informs us, that when one German nation intended to declare war against another, they looked out for a prisoner who was to fight with one of their people, and by the event they judged of the success of the war. A nation who believed that public quarrels could be determined by a single combat might very well think that it was proper also for deciding the disputes of individuals.

Gundebald, King of Burgundy, gave the greatest sanction to the custom of legal duels.[i] The reason he assigns for this law is mentioned in his edict. "It is," says he, "in order to prevent our subjects from attesting by oath what is uncertain, and perjuring themselves about what is certain." Thus, while the clergy declared that an impious law which permitted combats,[j] the Burgundian kings looked upon that as a sacrilegious law which authorized the taking of an oath.

The trial by combat had some reason for it, founded on experience. In a military nation, cowardice supposes other vices; it is an argument of a person's having deviated from the principles of his education, of his being insensible of honor, and of having refused to be directed by those maxims which govern other men; it shows that he neither fears their contempt, nor sets any value upon their esteem. Men of any tolerable extraction seldom want either the dexterity requisite to co-operate with strength, or the strength necessary to concur with courage; for as they set a value upon honor they are practised in matters without which this honor cannot be obtained. Besides, in a military nation, where strength, courage, and prowess are esteemed, crimes really odious are those which arise from fraud, artifice, and cunning, that is from cowardice.

With regard to the trial by fire, after the party accused had

h See the codes of barbarian laws, and, in respect to less ancient times, Beaumanoir on the "Customs of Beauvoisis."

i Law of the Burgundians, chap. xlv.

j See the works of Agobard.

put his hand on a hot iron, or in boiling water, they wrapped the hand in a bag and sealed it up; if after three days there appeared no mark, he was acquitted. Is it not plain, that among people inured to the handling of arms, the impression made on a rough or callous skin by the hot iron or by boiling water could not be so great as to be seen three days afterwards? And if there appeared any mark it showed that the person who had undergone the trial was an effeminate fellow. Our peasants are not afraid to handle hot iron with their callous hands; and, with regard to the women, the hands of those who worked hard might be very well able to resist hot iron. The ladies did not want champions to defend their cause: and in a nation where there was no luxury, there was no middle state.[k]

By the law of the Thuringians [l] a woman accused of adultery was condemned to the trial by boiling water only when there was no champion to defend her; and the law of the Ripuarians admits of this trial [m] only when a person had no witnesses to appear in justification. Now a woman that could not prevail upon any one relative to defend her cause, or a man that could not produce one single witness to attest his honesty were, from those very circumstances, sufficiently convicted.

I conclude, therefore, that under the circumstances of time in which the trial by combat and the trial by hot iron and boiling water obtained, there was such an agreement between those laws and the manners of the people, that the laws were rather unjust in themselves than productive of injustice, that the effects were more innocent than the cause, that they were more contrary to equity than prejudicial to its rights, more unreasonable than tyrannical.

18.—*In what manner the Custom of judicial Combats gained Ground*

From Agobard's letter to Louis the Debonnaire it might be inferred that the custom of judicial combats was not established among the Franks; for having represented to that prince the abuses of the law of Gundebald, he desires that private disputes should be decided in Burgundy by the law of the Franks.[n]

[k] See Beaumanoir on the "Custom of Beauvoisis," chap. lxi. See also the law of the Angli, chap. xiv., where the trial by boiling water is only a subsidiary proof.

[l] Tit. 14.

[m] Chap. xxxi. sec. 5.

[n] "Si placeret Domino nostro ut eos transferret ad legem Francorum."

But as it is well known from other quarters that the trial by combat prevailed at that time in France, this has been the cause of some perplexity. However, the difficulty may be solved by what I have said; the law of the Salian Franks did not allow of this kind of trial and that of the Ripuarian Franks did.[o]

But, notwithstanding the clamors of the clergy, the custom of judicial combats gained ground continually in France; and I shall presently make it appear, that the clergy themselves were in a great measure the occasion of it.

It is the law of the Lombards that furnishes us with this proof. "There has been long since a detestable custom introduced," says the preamble to the constitution of Otho II:[p] "this is, that if the title to an estate was said to be false, the person who claimed under that title made oath upon the Gospel that it was genuine; and without any preceding judgment he took possession of the estate; so that they who would perjure themselves were sure of gaining their point." The Emperor Otho I having caused himself to be crowned at Rome[q] at the very time that a Council was there under Pope John XII all the lords of Italy represented to that prince the necessity of enacting a law to reform this horrible abuse.[r] The Pope and the Emperor were of opinion that the affair should be referred to the Council which was to be shortly held at Ravenna.[s] There the lords made the same demands, and redoubled their complaints; but the affair was put off once more under pretence of the absence of particular persons. When Otho II and Conrad, King of Burgundy, arrived in Italy,[t] they had a conference at Verona[u] with the Italian lords;[v] and at their repeated solicitations, the Emperor, with their unanimous consent, made a law, that whenever there happened any disputes about inheritances while one of the parties insisted upon the legality of his title and the other maintained its being false, the affair should be decided by combat; that the same rule should be observed in contests relating to fiefs; and that the clergy should be subject to the

o See this law, tit. 59, sec. 4, and tit. 67, sec. 5.

p Law of the Lombards, book II. tit. 55, chap. 34.

q The year 962.

r "Ab Italiæ proceribus est proclamatum, ut imperator sanctus mutatâ lege, facinus indignum destrueret."—Law of the Lombards, book II. tit. 55, chap. xxxiv.

s It was held in the year 967, in the presence of Pope John XIII and of the Emperor Otho I.

t Otho II's uncle, son to Rodolphus, and King of Transjurian Burgundy.

u In the year 988.

v "Cum in hoc ab omnibus imperiales aures pulsarentur."—Law of the Lombards, book II. tit. 55, chap. xxxiv.

same law, but should fight by their champions. Here we see, that the nobility insisted on the trial by combat, because of the inconvenience of the proof introduced by the clergy, that notwithstanding the clamors of the nobility, the notoriousness of the abuse which called out loudly for redress, and the authority of Otho who came into Italy to speak and act as master, still the clergy held out in two Councils; in fine, that the joint concurrence of the nobility and princes having obliged the clergy to submit, the custom of judicial combats must have been considered as a privilege of the nobility, as a barrier against injustice, and as a security of property, and from that very moment this custom must have gained ground. And this was effected at a time when the power of the emperors was great, and that of the popes inconsiderable; at a time when the Othos came to revive the dignity of the empire in Italy.

I shall make one reflection which will corroborate what has been above said, namely, that the institution of negative proofs entailed that of judicial combats. The abuse, complained of to the Othos, was, that a person who was charged with having a false title to an estate, defended himself by a negative proof, declaring upon the Gospels it was not false. What was done to reform the abuse of a law which had been mutilated? The custom of combat was revived.

I hastened to speak of the constitution of Otho II, in order to give a clear idea of the disputes between the clergy and the laity of those times. There had been indeed a constitution of Lotharius I [w] of an earlier date, a sovereign who, upon the same complaints and disputes, being desirous of securing the just possession of property, had ordained that the notary should make oath that the deed or title was not forged; and if the notary should happen to die, the witnesses should be sworn who had signed it. The evil, however, still continued, till they were obliged at length to have recourse to the remedy above mentioned.

Before that time I find that, in the general assemblies, held by Charlemagne, the nation represented to him,[x] that in the actual state of things it was extremely difficult for either the accuser or the accused to avoid perjuring themselves, and that for this

[w] In the law of the Lombards, book II tit. 55, sec. 33. In the copy which Muratori made use of it is attributed to the Emperor Guido. [x] Ibid., sec. 23.

reason it was much better to revive the judicial combat, which was accordingly done.

The usage of judicial combats gained ground among the Burgundians, and that of an oath was limited. Theodoric, King of Italy, suppressed the single combat among the Ostrogoths;[y] and the laws of Chaindasuinthus and Recessuinthus seemed as if they would abolish the very idea of it. But these laws were so little respected in Narbonne Gaul, that they looked upon the legal duel as a privilege of the Goths.[z]

The Lombards who conquered Italy after the Ostrogoths had been destroyed by the Greeks, introduced the custom of judicial combat into that country, but their first laws gave a check to it.* Charlemagne,[a] Louis the Debonnaire, and the Othos made divers general constitutions, which we find inserted in the laws of the Lombards and added to the Salic laws, whereby the practice of legal duels, at first in criminal, and afterwards in civil cases, obtained a greater extent. They knew not what to do. The negative proof by oath had its inconveniences; that of legal duels had its inconveniences also; hence they often changed, according as the one or the other affected them most.

On the one hand, the clergy were pleased to see that in all secular affairs people were obliged to have recourse to the altar,[b] and, on the other, a haughty nobility were fond of maintaining their rights by the sword.

I would not have it inferred that it was the clergy who introduced the custom so much complained of by the nobility. This custom was derived from the spirit of the barbarian laws, and from the establishment of negative proofs. But a practice that contributed to the impunity of such a number of criminals, having given some people reason to think it was proper to make use of the sanctity of the churches in order to strike terror into the guilty, and to intimidate perjurers, the clergy maintained this

y Cassiod, iii., let. 23 and 24.

z "In palatio quoque, Bera comes Barcinonensis, cum impeteretur a quodam vocato Sunila, et infidelitatis argueretur, cum eodem secundum legem propriam, utpote quia uterque Gothus erat, equestri prælio congressus est et victus."—The anonymous author of the "Life of Louis the Debonnaire."

* See in the law of the Lombards, book I. tit. 4 and tit. 9, sec. 23, and book II. tit. 35, secs. 4 and 5, and tit. 55, secs. 1, 2, and 3. The regulations of Rotharis; and in sec. 15, that of Luitprandus.

a Ibid. book II. tit. 55, sec. 23.

b The judicial oaths were made at that time in the churches, and during the first race of our kings there was a chapel set apart in the royal palace for the affairs that were to be thus decided. See the formulas of Marculfus, book I. chap. xxxviii. The laws of the Ripuarians, tit. 59, sec. 4, tit. 65, sec. 5. The history of Gregory of Tours; and the Capitulary of the year 803, added to the Salic law.

usage and the practice which attended it: for in other respects they were absolutely averse to negative proofs. We find in Beaumanoir[c] that this kind of proof was never allowed in ecclesiastic courts, which contributed greatly without doubt to its suppression, and to weaken in this respect the regulation of the codes of the barbarian laws.

This will convince us more strongly of the connection between the usage of negative proofs and that of judicial combats, of which I have said so much. The lay tribunals admitted of both, and both were rejected by the ecclesiastic courts.

In choosing the trial by duel the nation followed its military spirit; for while this was established as a divine decision, the trials by the cross, by cold or boiling waters, which had been also regarded in the same lights, were abolished.

Charlemagne ordained, that if any difference should arise between his children, it should be terminated by the judgment of the cross. Louis the Debonnaire,[d] limited this judgment to ecclesiastic affairs; his son Lotharius abolished it in all cases; nay, he suppressed even the trial by cold water.[e]

I do not pretend to say, that at a time when so few usages were universally received, these trials were not revived in some churches, especially as they are mentioned in a charter of Philip Augustus,[f] but I affirm that they were very seldom practised. Beaumanoir,[g] who lived at the time of St. Louis and a little after, enumerating the different kinds of trial, mentions that of judicial combat, but not a word of the others.

19.—*A new Reason of the Disuse of the Salic and Roman Laws, as also of the Capitularies*

I have already mentioned the reasons that had destroyed the authority of the Salic and Roman laws, as also of the Capitularies; here I shall add, that the principal cause was the great extension given to judiciary combats.

As the Salic laws did not admit of this custom, they became in some measure useless, and fell into oblivion. In like manner the

c Chap. xxxix. p. 212.

d We find his Constitutions inserted in the law of the Lombards and at the end of the Salic laws.

e In a constitution inserted in the law of the Lombards, book II. tit. 55, sec. 31.

f In the year 1200.

g "Custom of Beauvoisis," chap. xxxix.

Roman laws, which also rejected this custom, were laid aside; their whole attention was then taken up in establishing the law of judicial combats, and in forming a proper digest of the several cases that might happen on those occasions. The regulations of the Capitularies became likewise of no manner of service. Thus it is that such a number of laws lost all their authority, without our being able to tell the precise time in which it was lost; they fell into oblivion, and we cannot find any others that were substituted in their place.

Such a nation had no need of written laws; hence its written laws very easily fall into disuse.

If there happened to be any disputes between two parties, they had only to order a single combat. For this no great knowledge or abilities were requisite.

All civil and criminal actions are reduced to facts. It is upon these facts they fought; and not only the substance of the affair, but likewise the incidents and imparlances were decided by combat, as Beaumanoir observes, who produces several instances.*h*

I find that towards the commencement of the third race, the jurisprudence of those times related entirely to precedents, everything was regulated by the point of honor. If the judge was not obeyed, he insisted upon satisfaction from the person that contemned his authority. At Bourges if the provost had summoned a person and he refused to come, his way of proceeding was to tell him, " I sent for thee, and thou didst not think it worth thy while to come; I demand therefore satisfaction for this thy contempt." Upon which they fought.*i* Louis the Fat reformed this custom.*j*

The custom of legal duels prevailed at Orleans, even in all demands of debt.*k* Louis the Young, declared that this custom should take place only when the demand exceeded five sous. This ordinance was a local law; for in St. Louis's time it was sufficient that the value was more than twelve deniers.*l* Beaumanoir *m* had heard a gentleman of the law affirm, that formerly there had been a bad custom in France of hiring a champion for a certain time to fight their battles in all causes. This shows

h Chap. lxi. pp. 309, 310.
i Charter of Louis the Fat, in the year 1145, in the Collection of Ordinances.
j Ibid.
k Charter of Louis the Young, in 1168, in the Collection of Ordinances.
l See Beaumanoir, chap. lxiii. p. 325.
m See the " Custom of Beauvoisis," chap. xxviii. p. 203.

that the custom of judiciary combat must have prevailed at that time to a wonderful extent.

20.—*Origin of the Point of Honor*

We meet with inexplicable enigmas in the codes of laws of the barbarians. The law of the Frisians [n] allows only half a sou in composition to a person that had been beaten with a stick, and yet for ever so small a wound it allows more. By the Salic law, if a freeman gave three blows with a stick to another freeman, he paid three sous; if he drew blood, he was punished as if he had wounded him with steel, and he paid fifteen sous: thus the punishment was proportioned to the greatness of the wound. The law of the Lombards established different compositions for one, two, three, four blows, and so on.[o] At present, a single blow is equivalent to a hundred thousand.

The constitution of Charlemagne, inserted in the law of the Lombards, ordains that those who were allowed the trial by combat should fight with bastons.[p] Perhaps this was out of regard to the clergy; or probably, as the usage of legal duels gained ground, they wanted to render them less sanguinary. The Capitulary of Louis the Debonnaire, allows the liberty of choosing to fight either with the sword or baston.[q] In process of time none but bondmen fought with the baston.[r]

Here I see the first rise and formation of the particular articles of our point of honor. The accuser began by declaring in the presence of the judge that such a person had committed such an action, and the accused made answer that he lied,[s] upon which the judge gave orders for the duel. It became then an established rule, that whenever a person had the lie given him, it was incumbent on him to fight.

Upon a man's declaring that he would fight [t] he could not afterwards depart from his word; if he did, he was condemned to a penalty. Hence this rule ensued, that whenever a person had engaged his word, honor forbade him to recall it.

Gentlemen fought one another on horseback, and armed at all points; [u] villains fought on foot and with bastons.[v] Hence it

[n] "Additio sapientium Willemari," tit. 5.
[o] Book I. tit. 6, sec. 3.
[p] Book II. tit. 5, sec. 23.
[q] Added to the Salic law in 819.
[r] See Beaumanoir, lxiv. p. 323.
[s] Ibid. p. 329.
[t] See Beaumanoir, iii. pp. 25 and 329.
[u] See in regard to the arms of the combatants, Beaumanoir, chap. lxi. p. 308, and chap. lxiv. p. 328.
[v] Ibid. chap. lxiv. p. 328. See also the Charters of St. Aubin of Anjou, quoted by Galland, p. 263.

followed that the baston was looked upon as the instrument of insults and affronts,[w] because to strike a man with it was treating him like a villain.

None but villains fought with their faces uncovered,[x] so that none but they could receive a blow on the face. Therefore, a box on the ear became an injury that must be expiated with blood, because the person who received it had been treated as a villain.

The several peoples of Germany were no less sensible than we of the point of honor; nay, they were more so. Thus the most distant relatives took a very considerable share to themselves in every affront, and on this all their codes are founded. The law of the Lombards ordains,[y] that whosoever goes attended with servants to beat a man unawares, in order to load him with shame and to render him ridiculous, should pay half the composition which he would owe if he had killed him; [z] and if through the same motive he tied or bound him, he would pay three-quarters of the same composition.

Let us then conclude that our forefathers were extremely sensible of affronts; but that affronts of a particular kind, such as being struck with a certain instrument on a certain part of the body, and in a certain manner, were as yet unknown to them. All this was included in the affront of being beaten, and in this case the amount of violence determined the magnitude of the outrage.

21.—*A new Reflection upon the Point of Honor among the Germans*

"It was a great infamy," says Tacitus,[a] "among the Germans for a person to leave his buckler behind him in battle; for which reason many after a misfortune of this kind have destroyed themselves." Thus the ancient Salic law [b] allows a composition of fifteen sous to any person that had been injuriously reproached with having left his buckler behind him.

When Charlemagne amended the Salic law,[c] he allowed in this case no more than three sous in composition. As this prince cannot be suspected of having had a design to enervate the mili-

w Among the Romans, it was not infamous to be beaten with a stick, "lege ictus fustium. De iis qui notantur infamia."

x They had only the baston and buckler.—Beaumanoir, chap. lxiv. p. 328.

y Book I. tit. 6, sec. 1.

z Book I. tit. 6, sec. 2.

a "De Moribus Germanorum."

b In the "Pactus legis Salicæ."

c We have both the ancient law and that which was amended by this prince.

tary discipline, it is manifest that such an alteration was due to a change of weapons, and that from this change of weapons a great number of usages derive their origin.

22.—*Of the Manners in relation to judicial Combats*

Our connections with the fair sex are founded on the pleasure of enjoyment; on the happiness of loving and being loved; and likewise on the ambition of pleasing the ladies, because they are the best judges of some of those things which constitute personal merit. This general desire of pleasing produces gallantry which is not love itself, but the delicate, the volatile, the perpetual simulation of love.

According to the different circumstances of every country and age, love inclines more to one of those three things than to the other two. Now I maintain, that the prevailing spirit at the time of our judicial combats must have been that of gallantry.

I find in the law of the Lombards,[d] that if one of the two champions was found to have any magic herbs about him, the judge ordered them to be taken from him, and obliged him to swear he had no more. This law could be founded only on the vulgar opinion; it was fear, the alleged inventor of much that made them imagine this kind of prestige. As in single combats the champions were armed at all points, and as with heavy arms, both of the offensive and defensive kind, those of a particular temper and strength gave immense advantages, the notion of some champions having enchanted arms must certainly have turned the brains of a great many people.

Hence arose the marvellous system of chivalry. The minds of all sorts of people quickly imbibed these extravagant ideas. In romances are found knights-errant, necromancers, and fairies, winged or intelligent horses, invisible or invulnerable men, magicians who concerned themselves in the birth and education of great personages, enchanted and disenchanted palaces, a new world in the midst of the old one, the usual course of nature being left only to the lower class of mankind.

Knights-errant ever in armor, in a part of the world abounding in castles, forts, and robbers, placed all their glory in punishing injustice, and in protecting weakness. Hence our romances

[d] Book II. tit. 55, sec. 11

are full of gallantry founded on the idea of love joined to that of strength and protection.

Such was the origin of gallantry, when they formed the notion of an extraordinary race of men, who at the sight of a virtuous and beautiful lady in distress were inclined to expose themselves to all hazards for her sake, and to endeavor to please her in the common actions of life.

Our romances of chivalry flattered this desire of pleasing, and communicated to a part of Europe that spirit of gallantry which we may venture to affirm was very little known to the ancients.

The prodigious luxury of that immense city of Rome encouraged sensuous pleasures. The tranquillity of the plains of Greece gave rise to the description of the sentiments of love.[e] The idea of knights-errant, protectors of the virtue and beauty of the fair sex, led to that of gallantry.

This spirit was continued by the custom of tournaments, which uniting the rights of valor and love, added still a considerable importance to gallantry.

23.—*Of the Code of Laws on judicial Combats*

Some perhaps will have a curiosity to see this abominable custom of judiciary combat reduced to principles and to find the groundwork of such an extraordinary code of laws. Men, though reasonable in the main, reduce their very prejudices to rule. Nothing was more contrary to good sense, than those combats, and yet when once this point was laid down, a kind of prudential management was used in carrying it into execution.

In order to be thoroughly acquainted with the jurisprudence of those times, it is necessary to read with attention the regulations of St. Louis, who made such great changes in the judiciary order. Défontaines was contemporary with that prince; Beaumanoir wrote after him;[f] and the rest lived since his time. We must, therefore, look for the ancient practice in the amendments that have been made of it.

24.—*Rules established in the judicial Combat*

When there happened to be several accusers, they were obliged to agree among themselves that the action might be carried on by a single prosecutor; and, if they could not agree, the person be-

[e] See the Greek romances of the Middle Age. [f] In the year 1283.

fore whom the action was brought, appointed one of them to prosecute the quarrel.*g*

When a gentleman challenged a villain, he was obliged to present himself on foot with buckler and baston; but if he came on horseback and armed like a gentleman, they took his horse and his arms from him, and stripping him to his shirt, they compelled him to fight in that condition with the villain.*h*

Before the combat the magistrates ordered three bans to be published. By the first the relatives of the parties were commanded to retire; by the second the people were warned to be silent; and the third prohibited the giving of any assistance to either of the parties, under severe penalties, nay, even on pain of death if by this assistance either of the combatants should happen to be vanquished.*i*

The officers belonging to the civil magistrate *j* guarded the list or enclosure where the battle was fought; and in case either of the parties declared himself desirous of peace, they took particular notice of the actual state in which they mutually stood at that very moment, to the end that they might be restored to the same situation, in case they did not come to an understanding.*k*

When the pledges were received either for a crime or for false judgment, the parties could not make up the matter without the consent of the lord; and when one of the parties was overcome, there could be no accommodation without the permission of the count, which had some analogy to our letters of grace.*l*

But if it happened to be a capital crime, and the lord, corrupted by presents, consented to an accommodation, he was obliged to pay a fine of sixty livres, and the right he had of punishing the malefactor devolved upon the count.*m*

There were a great many people incapable either of offering, or of accepting battle. But liberty was given them, on cause being shown, to choose a champion; and that he might have a stronger interest in defending the party, in whose behalf he appeared, his hand was cut off if he lost the battle.*n*

g Beaumanoir, chap. vi. pp. 40 and 41.
h Ibid. chap. lxiv. p. 328.
i Ibid. chap. lxiv. p. 330.
j Ibid.
k Ibid.
l The great vassals had particular privileges.
m Beaumanoir, chap. lxiv. p. 330, says, he lost his jurisdiction: these words in the authors of those days have not a general signification, but a signification limited to the affair in question. Défontaines, chap. xxi. art. 29.
n This custom, which we meet with in the Capitularies, was still subsisting at the time of Beaumanoir. See chap. lxi. p. 315.

When capital laws were made in the last century against duels, perhaps it would have been sufficient to have deprived a warrior of his military capacity by the loss of his hand; nothing in general being a greater mortification to mankind than to survive the loss of their character.

When, in capital cases, the duel was fought by champions, the parties were placed where they could not behold the battle; each was bound with the cord that was to be used at his execution in case his champion was overcome.[o]

The person overcome in battle did not always lose the point contested; if, for instance, they fought on an imparlance, he lost only the imparlance.[p]

25.—*Of the Bounds prescribed to the Custom of judicial Combats*

When pledges of battle had been received upon a civil affair of small importance, the lord obliged the parties to withdraw them.

If a fact was notorious; for instance, if a man had been assassinated in the open market-place, then there was neither a trial by witnesses, nor by combat; the judge gave his decision from the notoriety of the fact.[q]

When the court of a lord had often determined after the same manner, and the usage was thus known,[r] the lord refused to grant the parties the privilege of duelling, to the end that the usages might not be altered by the different success of the combats.

They were not allowed to insist upon duelling but for themselves, for some one belonging to their family, or for their liege lord.[s]

When the accused had been acquitted, another relative could not insist on fighting him; otherwise disputes would never be terminated.[t]

If a person appeared again in public whose relatives, upon a supposition of his being murdered, wanted to revenge his death, there was then no room for a combat; the same may be said if by a notorious absence the fact was proved to be impossible.[u]

o Beaumanoir, chap. lxiv. p. 330.
p Ibid. chap. lxi. p. 309.
q Ibid. p. 308; chap. xliii. p. 239.
r Ibid., chap. lxi. p. 314. See also Défontaines, chap. xxii. art 24.
s Beaumanoir, chap. lxiii. p. 322.
t Ibid.
u Ibid.

If a man who had been mortally wounded had exculpated before his death the person accused and named another, they did not proceed to a duel; but if he had mentioned nobody his declaration was looked upon as a forgiveness on his death-bed; the prosecution was continued, and even among gentlemen they could make war against each other.[v]

When there was a conflict, and one of the relatives had given or received pledges of battle, the right of contest ceased; for then it was thought that the parties wanted to pursue the ordinary course of justice; therefore he that would have continued the contest would have been sentenced to make good all the losses.

Thus the practice of judiciary combat had this advantage, that it was apt to change a general into an individual quarrel, to restore the courts of judicature to their authority, and to bring back into the civil state those who were no longer governed but by the law of nations.

As there are an infinite number of wise things that are managed in a very foolish manner; so there are many foolish things that are very wisely conducted.

When a man who was challenged with a crime visibly showed that it had been committed by the challenger himself, there could be then no pledges of battle; for there is no criminal but would prefer a duel of uncertain event to a certain punishment.[w]

There were no duels in affairs decided by arbiters,[x] nor by ecclesiastical courts, nor in cases relating to women's dowries.

"A woman," says Beaumanoir, "cannot fight." If a woman challenged a person without naming her champion, the pledges of battle were not accepted. It was also requisite that a woman should be authorized by her baron, that is, by her husband, to challenge; but she might be challenged without this authority.[y]

If either the challenger or the person challenged were under fifteen years of age, there could be no combat.[z] They might order it, indeed, in disputes relating to orphans when their guardians or trustees were willing to run the risk of this procedure.

The cases in which a bondman was allowed to fight are, I think, as follows. He was allowed to fight another bondman; to fight a freed-man, or even a gentleman, in case he were challenged; but if he himself challenged, the other might refuse to

v Beaumanoir, chap. lxiii. p. 323.
w Ibid. p. 324.
x Ibid. p. 325.
y Ibid.
z Ibid. p. 323. (See also what I have said in book XVIII.)

fight; and even the bondman's lord had a right to take him out of the court.[a] The bondman might by his lord's charter or by usage fight with any freeman;[b] and the church claimed this right for her bondmen[c] as a mark of respect due to her by the laity.[d]

26.—*On the judiciary Combat between one of the Parties and one of the Witnesses*

Beaumanoir informs us,[e] that a person who saw a witness going to swear against him might elude the other, by telling the judges that his adversary produced a false and slandering witness; and if the witness was willing to maintain the quarrel, he gave pledges of battle. The enquiry was no longer the question; for if the witness was overcome, it was decided that the adversary had produced a false witness, and he lost his cause.

It was necessary that the second witness should not be heard; for if he had made his attestation, the affair would have been decided by the deposition of two witnesses. But by staying the second, the deposition of the first witness became void.

The second witness being thus rejected, the party was not allowed to produce any others, but he lost his cause; in case, however, there had been no pledges of battle he might produce other witnesses.

Beaumanoir observes,[f] that the witness might say to the party he appeared for, before he made his deposition: "I do not care to fight for your quarrel, nor to enter into any debate; but if you are willing to stand by me, I am ready to tell the truth." The party was then obliged to fight for the witness, and if he happened to be overcome, he did not lose his cause,[g] but the witness was rejected.

This, I believe, was a modification of the ancient custom; and what makes me think so is, that we find this usage of challenging the witnesses established in the laws of the Bavarians[h] and Burgundians[i] without any restriction.

I have already made mention of the constitution of Gundebald,

a Beaumanoir, chap. lxiii. p. 322.
b Défontaines, chap. xxii. art. 7.
c "Habeant bellandi et testificandi licentiam."—Charter of Louis the Fat, in the year 1118.
d Ibid.
e Chap. lxi. p. 315.
f Chap. vi. pp. 39 and 40.
g But if the battle was fought by champions, the champion that was overcome had his hand cut off.
h Tit. 16, sec. 7.
i Tit. 45.

against which Agobard *j* and St. Avitus *k* made such loud complaints. "When the accused," says this prince, "produces witnesses to swear that he has not committed the crime, the accuser may challenge one of the witnesses to a combat; for it is very just that the person who has offered to swear, and has declared that he was certain of the truth, should make no difficulty of maintaining it by combat." Thus the witnesses were deprived by this king of every kind of subterfuge to avoid the judiciary combat.

27.—*Of the judiciary Combat between one of the Parties and one of the Lords' Peers. Appeal of false Judgment*

As the nature of judicial combats was to terminate the affair forever, and was incompatible with a new judgment and new prosecutions,*l* an appeal, such as is established by the Roman and Canon laws, that is, to a superior court in order to rejudge the proceedings of an inferior, was a thing unknown in France.

This is a form of proceeding to which a warlike nation, governed solely by the point of honor, was quite a stranger; and agreeably to this very spirit, the same methods were used against the judges as were allowed against the parties.*m*

An appeal among the people of this nation was a challenge to fight with arms, a challenge to be decided by blood; and not that invitation to a paper quarrel, the knowledge of which was reserved for succeeding ages.*n*

Thus St. Louis in his Institutions says, that an appeal includes both felony and iniquity. Thus Beaumanoir tells us, that if a vassal wanted to make his complaint of an outrage committed against him by his lord,*o* he was first obliged to announce that he quitted his fief; after which he appealed to his lord paramount, and offered pledges of battle. In like manner the lord renounced the homage of his vassal, if he challenged him before the count.

For a vassal to challenge his lord of false judgment was as much as to say to him, that his sentence was unjust and malicious; now to utter such words against his lord was in some measure committing the crime of felony.

Hence, instead of bringing a challenge of false judgment

j Letter to Louis the Debonnaire.
k "Life of St. Avitus."
l Beaumanoir, chap. II. p. 22.
m Ibid., chap. lxi. p. 312, and chap. lxvii. p. 338.
n Book II. chap. xv.
o Beaumanoir, chap. lxi. pp. 310 and 311, and chap. lxvii. p. 337.

against the lord who appointed and directed the court, they challenged the peers of whom the court itself was formed, by which means they avoided the crime of felony, for they insulted only their peers, with whom they could always account for the affront.

It was a very dangerous thing to challenge the peers of false judgment.[p] If the party waited till judgment was pronounced, he was obliged to fight them all when they offered to make good their judgment.[q] If the appeal was made before all the judges had given their opinion, he was obliged to fight all who had agreed in their judgment. To avoid this danger, it was usual to petition the lord to direct that each peer should give his opinion aloud;[r] and when the first had pronounced, and the second was going to do the same, the party told him that he was a liar, a knave, and a slanderer, and then he had to fight only with that peer.

Défontaines[s] would have it, that before a challenge was made of false judgment, it was customary to let three judges pronounce; and he does not say that it was necessary to fight them all three, much less that there was any obligation to fight all those who had declared themselves of the same opinion. These differences arose from this, that in those times there were few usages exactly in all parts the same; Beaumanoir gives an account of what passed in the county of Clermont; and Défontaines of what was practised in Vermandois.

When one of the peers or a vassal had declared that he would maintain the judgment, the judge ordered pledges of battle to be given, and likewise took security of the challenger, that he would maintain his case.[t] But the peer who was challenged gave no security, because he was the lord's vassal, and was obliged to defend the challenge, or to pay the lord a fine of sixty livres.

If he who challenged did not prove that the judgment was bad,[u] he paid the lord a fine of sixty livres, the same fine to the peer whom he had challenged, and as much to every one of those who had openly consented to the judgment.[v]

When a person, strongly suspected of a capital crime, had been taken and condemned, he could make no appeal of false

[p] Beaumanoir, chap. lxi. p. 313.
[q] Ibid. p. 314.
[r] Ibid.
[s] Chap. xxii. art. 1, 10, and 11, he says only, that each of them was allowed a small fine.
[t] Beaumanoir, chap. lxi. p. 314.
[u] Ibid. Défontaines, chap. xxii. art. 9.
[v] Ibid.

judgment:[w] for he would always appeal either to prolong his life, or to get an absolute discharge.

If a person said that the judgment was false and bad, and did not offer to prove it so, that is to fight, he was condemned to a fine of ten sous if a gentleman, and to five sous if a bondman, for the injurious expressions he had uttered.[x]

The judges or peers who were overcome, forfeited neither life nor limbs;[y] but the person who challenged them was punished with death, if it happened to be a capital crime.[z]

This manner of challenging the vassals with false judgment was to avoid challenging the lord himself. But if the lord had no peers,[a] or had not a sufficient number, he might at his own expense borrow peers of his lord paramount;[b] but these peers were not obliged to pronounce judgment if they did not like it; they might declare that they were come only to give their opinion: in that particular case, the lord himself judged and pronounced sentence as judge;[c] and if an appeal of false judgment was made against him, it was his business to answer to the challenge.

If the lord happened to be so very poor as not to be able to hire peers of his paramount,[d] or if he neglected to ask for them or the paramount refused to give them, then, as the lord could not judge by himself, and as nobody was obliged to plead before a tribunal where judgment could not be given, the affair was brought before the lord paramount.

This, I believe, was one of the principal causes of the separation between the jurisdiction and the fief, whence arose the maxim of the French lawyers, "The fief is one thing, and the jurisdiction is another." For as there were a vast number of peers who had no subordinate vassals under them, they were incapable of holding their court; all affairs were then brought before their lord paramount, and they lost the privilege of pronouncing judgment, because they had neither power nor will to claim it.

All the judges who had been at the judgment were obliged

w Beaumanoir, chap. lxi. p. 316, and Défontaines, chap. xxii. art. 21.

x Ibid. chap. lxi. p. 314.

y Défontaines, chap. xxii. art. 7.

z See Défontaines, chap. xxi. art. 11 and 12, and following, who distinguishes the cases in which the appellant of false judgment loses his life, the point contested, or only the imparlance.

a Beaumanoir, chap. lxii. p. 322. Défontaines, chap. xxii.

b The count was not obliged to lend any. Beaumanoir, chap. lxvii. p. 337.

c Nobody can pass judgment in his court, says Beaumanoir, chap. lxvii. pp. 336 and 337.

d Ibid. chap. lxii. p. 322.

to be present when it was pronounced, that they might follow one another, and say aye to the person who, wanting to make an appeal of false judgment, asked them whether they followed;[e] for Défontaines says,[f] "that it is an affair of courtesy and loyalty, and there is no such thing as evasion or delay." Hence, I imagine, arose the custom still followed in England, of obliging the jury to be all unanimous in their verdict, in cases relating to life and death.

Judgment was therefore given, according to the opinion of the majority; and if there was an equal division, sentence was pronounced, in criminal cases, in favor of the accused; in cases of debt, in favor of the debtor; and in cases of inheritance, in favor of the defendant.

Défontaines observes,[g] that a peer could not excuse himself by saying that he would not sit in court if there were only four,[h] or if the whole number, or at least the wisest part, were not present. This is just as if he were to say in the heat of an engagement, that he would not assist his lord, because he had not all his vassals with him. But it was the lord's business to cause his court to be respected, and to choose the bravest and most knowing of his tenants. This, I mention, in order to show the duty of vassals, which was to fight, and to give judgment: and such, indeed, was this duty, that to give judgment was all the same as to fight.

It was lawful for a lord, who went to law with his vassal in his own court, and was cast, to challenge one of his tenants with false judgment. But as the latter owed a respect to his lord for the fealty he had vowed, and the lord, on the other hand, owed benevolence to his vassal for the fealty accepted; it was customary to make a distinction between the lord's affirming in general that the judgment was false and unjust,[i] and imputing personal prevarications to his tenant.[j] In the former case he affronted his own court, and in some measure himself, so that there was no room for pledges of battle. But there was room in the latter, because he attacked his vassal's honor; and the person overcome was deprived of life and property, in order to maintain the public tranquillity.

e Défontaines, chap. xxi. art. 27 and 28.
f Ibid. art. 28.
g Chap. xxi. art. 37.
h This number at least was necessary. Défontaines, chap. xxi. art. 36.
i Beaumanoir, chap. lxvii. p. 337.
j Ibid.

This distinction, which was necessary in that particular case, had afterwards a greater extent. Beaumanoir says, that when the challenger of false judgment attacked one of the peers by personal imputation, battle ensued; but if he attacked only the judgment, the peer challenged was at liberty to determine the dispute either by battle or by law.[k] But as the prevailing spirit in Beaumanoir's time was to restrain the usage of judicial combats, and as this liberty which had been granted to the peer challenged of defending the judgment by combat or not is equally contrary to the ideas of honor established in those days, and to the obligation the vassal lay under of defending his lord's jurisdiction, I am apt to think, that this distinction of Beaumanoir's was a novelty in French jurisprudence.

I would not have it thought that all appeals of false judgment were decided by battle; it fared with this appeal as with all others. The reader may recollect the exceptions mentioned in the 25th chapter. Here it was the business of the superior court to examine whether it was proper to withdraw the pledges of battle or not.

There could be no appeal of false judgment against the king's court; because, as there was no one equal to the king, no one could challenge him; and as the king had no superior, none could appeal from his court.

This fundamental regulation, which was necessary as a political law, diminished also as a civil law the abuses of the judicial proceedings of those times. When a lord was afraid that his court would be challenged with false judgment, or perceived that they were determined to challenge, if the interests of justice required that it should not be challenged, he might demand from the king's court, men whose judgment could not be set aside.[l] Thus King Philip, says Défontaines,[m] sent his whole Council to judge an affair in the court of the Abbot of Corbey.

But if the lord could not have judges from the king, he might remove his court into the king's, if he held immediately of him; and if there were intermediate lords, he had recourse to his *suzerain*, removing from one lord to another till he came to the sovereign.

Thus, notwithstanding they had in those days neither the practice nor even the idea of our modern appeals, yet they had

k Beaumanoir, chap. lxvii. pp. 337 and 338. *l* Défontaines, chap. xxii. *m* Ibid.

recourse to the king, who was the source whence all those rivers flowed, and the sea into which they returned.

28.—*Of the Appeal of Default of Justice*

The appeal of default of justice was, when the court of a particular lord deferred, evaded, or refused to do justice to the parties.

During the time of our princes of the second race, though the count had several officers under him, their person was subordinate, but not their jurisdiction. These officers in their court days, assizes, or *placita*, gave judgment in the last resort as the count himself; all the difference consisted in the division of the jurisdiction. For instance, the count had the power of condemning to death, of judging of liberty, and of the restitution of goods, which the *centenarii* had not.[n]

For the same reason there were greater cases which were reserved to the king; namely, those which directly concerned the political order of the state.[o] Such were the disputes between bishops, abbots, counts, and other grandees, which were determined by the king, together with the great vassals.[p]

What some authors have advanced, namely, that an appeal lay from the count to the king's commissary, or *missus dominicus*, is not well grounded. The count and the *missus* had an equal jurisdiction, independent of each other.[q] The whole difference was, that the *missus* held his *placita*, or assizes, four months in the year,[r] and the count the other eight.

If a person, who had been condemned at an assize, demanded to have his cause tried over again, and was afterwards cast, he paid a fine of fifteen sous, or received fifteen blows from the judges who had decided the affair.[s]

When the counts, or the king's commissaries did not find themselves able to bring the great lords to reason, they made them give bail or security [t] that they would appear in the king's court: this was to try the cause, and not to rejudge it. I find in

n Third Capitulary of the year 812, art. 3, edition of Baluzius, p. 497, and of Charles the Bald, added to the law of the Lombards, book II. art. 3.

o Ibid., p. 497.

p "Cum fidelibus."—Capitulary of Louis the Debonnaire, edition of Baluzius, p. 667.

q See the Capitulary of Charles the Bald, added to the law of the Lombards, book II. art. 3.

r Third Capitulary of the year 812, art. 8.

s "Placitum."

t This appears by the formulas, charters, and the capitularies.

the Capitulary of Metz [u] a law by which the appeal of false judgment to the king's court is established, and all other kinds of appeal are proscribed and punished.

If they refused to submit to the judgment of the sheriffs [v] and made no complaint, they were imprisoned till they had submitted, but if they complained, they were conducted under a proper guard before the king, and the affair was examined in his court.

There could be hardly any room then for an appeal of default of justice. For instead of its being usual in those days to complain that the counts and others who had a right of holding assizes were not exact in discharging this duty,[w] it was a general complaint that they were too exact. Hence we find such numbers of ordinances, by which the counts and all other officers of justice are forbidden to hold their assizes above thrice a year. It was not so necessary to chastise their indolence, as to check their activity.

But, after an infinite number of petty lordships had been formed, and different degrees of vassalage established, the neglect of certain vassals in holding their courts gave rise to this kind of appeal; [x] especially as very considerable profits accrued to the lord paramount from the several fines.

As the custom of judicial combats gained every day more ground, there were places, cases, and times, in which it was difficult to assemble the peers, and consequently in which justice was delayed. The appeal of default of justice was therefore introduced, an appeal that has been often a remarkable era in our history; because most of the wars of those days were imputed to a violation of the political law; as the cause, or at least the pretence, of our modern wars is the infringement of the laws of nations.

Beaumanoir says [y] that, in case of default of justice, battle was not allowed: the reasons are these: 1. They could not challenge the lord himself, because of the respect due to his person; neither could they challenge the lord's peers, because the case was clear,

[u] In the year 757, edition of Baluzius, p. 1[illegible], arts. 9 and 10, and the synod "apud Vernas," in the year 755, art. 29, edition of Baluzius, p. 175. These two capitularies were made under King Pepin.

[v] The officers under the count, "scabini."

[w] See the law of the Lombards, book II. tit. 52, art. 22.

[x] There are instances of appeals of default of justice as early as the time of Philip Augustus.

[y] Chap. lxi. p. 315.

and they had only to reckon the days of the summons, or of the other delays; there had been no judgment passed, consequently there could be no appeal of false judgment: in fine, the crime of the peers offended the lord as well as the party, and it was against rule that there should be battle between the lord and his peers.

But as the default was proved by witnesses before the superior court: [z] the witnesses might be challenged, and then neither the lord nor his court were offended.

In case the default was owing to the lord's tenants or peers, who had delayed to administer justice, or had avoided giving judgment after past delays, then these peers were appealed of default of justice before the paramount; and if they were cast, they paid a fine to their lord.[a] The latter could not give them any assistance; on the contrary, he seized their fief till they had each paid a fine of sixty livres.

2. When the default was owing to the lord, which was the case whenever there happened not to be a sufficient number of peers in his court to pass judgment, or when he had not assembled his tenants or appointed somebody in his room to assemble them, an appeal might be made of the default before the lord paramount; but then the party and not the lord was summoned, because of the respect due to the latter.[b]

The lord demanded to be tried before the paramount, and if he was acquitted of the default, the cause was remanded to him, and he was likewise paid a fine of sixty livres.[c] But if the default was proved, the penalty inflicted on him was, to lose the trial of the cause,[d] which was to be then determined in the superior court. And, indeed, the complaint of default was made with no other view.

3. If the lord was sued in his own court,[e] which never happened but upon disputes in relation to the fief, after letting all the delays pass, the lord himself was summoned before the peers in the sovereign's name,[f] whose permission was necessary on that occasion. The peers did not make the summons in their

z Beaumanoir, chap. lxi. p. 315
a Défontaines, chap. xxi. art. 24.
b Ibid., art. 32.
c Beaumanoir, chap. lxi. p. 312.
d Défontaines, chap. xxi. arts. 1 and 29.
e This was the case in the famous difference between the Lord of Nesle and Joan, Countess of Flanders, during the reign of Louis VIII. He called upon her to have it tried within forty days, and thereupon challenged her at the king's court with default of justice. She answered that she would have it tried by her peers in Flanders. The king's court determined that it should not be sent there and that the countess should be cited.
f Défontaines, chap. xxi. art. 34.

own name, because they could not summon their lord, but they could summon for their lord.[g]

Sometimes the appeal of default of justice was followed by an appeal of false judgment, when the lord had caused judgment to be passed, notwithstanding the default.[h]

The vassal who had wrongfully challenged his lord of default of justice was sentenced to pay a fine according to his lord's pleasure.[i]

The inhabitants of Ghent had challenged the Earl of Flanders of default of justice before the king, for having delayed to give judgment in his own court.[j] Upon examination it was found, that he had used fewer delays than even the custom of the country allowed. They were therefore remanded to him; upon which their effects to the value of sixty thousand livres were seized. They returned to the king's court in order to have the fine moderated; but it was decided that the earl might insist upon the fine, and even upon more if he pleased. Beaumanoir was present at those judgments.

4. In other disputes which the lord might have with his vassal, in respect to the person or honor of the latter, or to property that did not belong to the fief, there was no room for a challenge of default of justice; because the cause was not tried in the lord's court, but in that of the paramount: vassals, says Défontaines,[k] having no power to give judgment on the person of their lord.

I have been at some trouble to give a clear idea of those things, which are so obscure and confused in ancient authors that to disentangle them from the chaos in which they were involved may be reckoned a new discovery.

29.—*Epoch of the Reign of St. Louis*

St. Louis abolished the judicial combats in all the courts of his demesne, as appears by the ordinance he published thereupon,[l] and by the Institutions.[m]

But he did not suppress them in the courts of his barons, except in the case of challenge of false judgment.[n]

[g] Défontaines, chap. xxi. art. 9.
[h] Beaumanoir, chap. lxi. p. 311.
[i] Ibid., p. 312. But he that was neither tenant nor vassal to the lord paid only a fine of sixty livres.—Ibid.
[j] Ibid., p. 318.
[k] Chap. xxi. art. 35.
[l] In the year 1260.
[m] Book I. chaps. ii. and vii., and book II. chaps. x. and xi.
[n] As appears everywhere in the "Institutions," etc., and Beaumanoir, chap. lxi. p. 309.

A vassal could not challenge the court of his lord of false judgment, without demanding a judicial combat against the judges who pronounced sentence. But St. Louis introduced the practice of challenging of false judgment without fighting, a change that may be reckoned a kind of revolution.[o]

He declared [p] that there should be no challenge of false judgment in the lordships of his demesnes, because it was a crime of felony. In reality, if it was a kind of felony against the lord, by a much stronger reason it was felony against the king. But he consented that they might demand an amendment [q] of the judgments passed in his courts; not because they were false or iniquitous, but because they did some prejudice.[r] On the contrary, he ordained, that they should be obliged to make a challenge of false judgment against the courts of the barons,[s] in case of any complaint.

It was not allowed by the Institutions, as we have already observed, to bring a challenge of false judgment against the courts in the king's demesnes. They were obliged to demand an amendment before the same court; and in case the bailiff refused the amendment demanded, the king gave leave to make an appeal to his court; [t] or rather, interpreting the Institutions by themselves, to present him a request or petition.[u]

With regard to the courts of the lords, St. Louis, by permitting them to be challenged of false judgment, would have the cause brought before the royal tribunal,[v] or that of the lord paramount, not to be decided by duel [w] but by witnesses, pursuant to a certain form of proceeding, the rules of which he laid down in the Institutions.[x]

Thus, whether they could falsify the judgment, as in the court of the barons; or whether they could not falsify, as in the court of his demesnes, he ordained that they might appeal without the hazard of a duel.

Défontaines [y] gives us the first two examples he ever saw, in which they proceeded thus without a legal duel: one, in a cause

o "Institutions," book I. chap. vi., and book II. chap. xv.
p Ibid. book II. chap. xv.
q Ibid. book I. chap. lxxviii., and book II. chap. xv.
r Ibid. book I. chap. lxxviii.
s Ibid. book II. chap. xv.
t Ibid. book I. chap. lxxviii.
u Ibid. book II. chap. xv.
v But if they wanted to appeal without falsifying the judgment, the appeal was not admitted.—"Institutions," book II. chap. xv.
w Book I. chaps. vi. and lxvii.; and book II. chap. xv.; and Beaumanoir, chap. xi. p. 58.
x Book I. chaps. i., ii., and iii.
y Chap. xxii. arts. 16 and 17.

tried at the court of St. Quentin, which belonged to the king's demesne; and the other, in the court of Ponthieu, where the count, who was present, opposed the ancient jurisprudence: but these two causes were decided by law.

Here, perhaps, it will be asked why St. Louis ordained for the courts of his barons a different form of proceeding from that which he had established in the courts of his demesne? The reason is this: when St. Louis made the regulation for the courts of his demesnes, he was not checked or limited in his views: but he had measures to keep with the lords who enjoyed this ancient prerogative, that causes should not be removed from their courts, unless the party was willing to expose himself to the dangers of an appeal of false judgment. St. Louis preserved the usage of this appeal; but he ordained that it should be made without a judicial combat; this is, in order to make the change less felt, he suppressed the thing, and continued the terms.

This regulation was not universally received in the courts of the lords. Beaumanoir says,[z] that in his time there were two ways of trying causes; one according to the king's establishment, and the other pursuant to the ancient practice; that the lords were at liberty to follow which way they pleased; but when they had pitched upon one in any cause, they could not afterwards have recourse to the other. He adds,[a] that the Count of Clermont followed the new practice, while his vassals kept to the old one; but that it was in his power to re-establish the ancient practice whenever he pleased, otherwise he would have less authority than his vassals.

It is proper here to observe, that France was at that time divided into the country of the king's demesne, and that which was called the country of the barons, or the baronies; and, to make use of the terms of St. Louis's Institutions, into the country under obedience to the king, and the country out of his obedience.[b] When the king made ordinances for the country of his demesne, he employed his own single authority. But when he published any ordinances that concerned also the country of his barons, these were made in concert with them,[c] or sealed and

z Chap. lxi. p. 309.

a Ibid.

b See Beaumanoir, Défontaines, and the "Institutions," book II. chaps. x., xi., xv., and others.

c See the ordinances at the beginning of the third race, in the collection of Laurière, especially those of Philip Augustus, on ecclesiastic jurisdiction; that of Louis VIII concerning the Jews; and the charters related by Mr. Brussel; particularly that of St. Louis,

subscribed by them: otherwise the barons received or refused them, according as they seemed conducive to the good of their baronies. The rear-vassals were upon the same terms with the great-vassals. Now the Institutions were not made with the consent of the lords, though they regulated matters which to them were of great importance: but they were received only by those who believed they would redound to their advantage. Robert, son of St. Louis, received them in his county of Clermont; yet his vassals did not think proper to conform to this practice.

30.—*Observation on Appeals*

I apprehend that appeals which were challenges to a combat, must have been made immediately on the spot. "If the party leaves the court without appealing," says Beaumanoir,[d] "he loses his appeal, and the judgment stands good." This continued still in force, even after all the restrictions of judicial combat.[e]

31.—*The same Subject continued*

The villain could not bring a challenge of false judgment against the court of his lord. This we learn from Défontaines,[f] and he is confirmed moreover by the Institutions.[g] Hence Défontaines says,[h] "between the lord and his villain there is no other judge but God."

It was the custom of judicial combats that deprived the villains of the privilege of challenging their lord's court of false judgment. And so true is this, that those villains [i] who by charter or custom had a right to fight had also the privilege of challenging their lord's court of false judgment, even though the peers who tried them were gentlemen; [j] and Défontaines proposes expedients to gentlemen in order to avoid the scandal of fighting with a villain by whom they had been challenged of false judgment.[k]

As the practice of judicial combats began to decline and the

on the release and recovery of lands, and the feodal majority of young women, tom. ii. book III. p. 35, and ibid., the Ordinance of Philip Augustus, p. 7.

d Chap. lxiii. p. 327; chap. lxi. p. 312.

e See the "Institutions" of St. Louis, book II. chap. xv., and the Ordinance of Charles VII in the year 1453.

f Chap. xxi. arts. 21 and 22.

g Book I. chap. cxxxvi.

h Chap. ii. art. 8.

i Défontaines, chap. xxii. art. 7. This article, and the 21st of the 22d chapter of the same author, have been hitherto very badly explained. Défontaines does not oppose the judgment of the lord to that of the gentleman, because it was the same thing; but he opposes the common villain to him who had the privilege of fighting.

j Gentlemen may always be appointed judges.—Défontaines, chap. xxi. art. 48.

k Chap. xxii. art. 14.

usage of new appeals to be introduced, it was reckoned unfair that freedmen should have a remedy against the injustice of the courts of their lords, and the villains should not; hence the Parliament received their appeals all the same as those of freemen.

32.—*The same Subject continued*

When a challenge of false judgment was brought against the lord's court, the lord appeared in person before his paramount to defend the judgment of his court. In like manner in the appeal of default of justice, the party summoned before the lord paramount brought his lord along with him, to the end that if the default was not proved, he might recover his jurisdiction.*l*

In process of time as the practice observed in these two particular cases became general, by the introduction of all sorts of appeals, it seemed very extraordinary that the lord should be obliged to spend his whole life in strange tribunals, and for other people's affairs. Philip of Valois ordained *m* that none but the bailiffs should be summoned; and when the usage of appeals became still more frequent, the parties were obliged to defend the appeal: the deed of the judge became that of the party.*n*

I took notice that in the appeal of default of justice *o* the lord lost only the privilege of having the cause tried in his own court. But if the lord himself was sued as party,*p* which became a very common practice,*q* he paid a fine of sixty livres to the king, or to the paramount, before whom the appeal was brought. Thence arose the usage after appeals had been generally received, of making the fine payable to the lord upon the reversal of the sentence of his judge; a usage which lasted a long time, and was confirmed by the ordinance of Rousillon, but fell, at length, to the ground through its own absurdity.

33.—*The same Subject continued*

In the practice of judicial combats, the person who had challenged one of the judges of false judgment might lose his cause by the combat, but could not possibly gain it.*r* And, indeed, the party who had a judgment in his favor ought not to have been

l Défontaines, chap. xxi. art. 33.

m In the year 1312.

n See the situation of things in Boutillier's time, who lived in the year 1402.—"Somme Rurale," book I. pp. 19 and 20.

o See chap. xxx.

p Beaumanoir, chap. lxi. pp. 312 and 318.

q Ibid.

r Défontaines, chap. xxi. art. 14.

deprived of it by another man's act. The appellant, therefore, who had gained the battle was obliged to fight likewise against the adverse party: not in order to know whether the judgment was good or bad (for this judgment was out of the case, being reversed by the combat), but to determine whether the demand was just or not; and it was on this new point they fought. Thence proceeds our manner of pronouncing decrees. "The court annuls the appeal; the court annuls the appeal and the judgment against which the appeal was brought." In effect, when the person who had made the challenge of false judgment happened to be overcome the appeal was reversed: when he proved victorious both the judgment and the appeal were reversed; then they were obliged to proceed to a new judgment.

This is so far true, that when the cause was tried by inquests this manner of pronouncing did not take place: witness what M. de la Roche Flavin says,[s] namely, that the chamber of enquiry could not use this form at the beginning of its existence.

34.—*In what Manner the Proceedings at Law became secret*

Duels had introduced a public form of proceeding so that both the attack and the defence were equally known. "The witnesses," says Beaumanoir,[t] "ought to give their testimony in open court."

Boutillier's commentator says he had learned of ancient practitioners, and from some old manuscript law books, that criminal processes were anciently carried on in public, and in a form not very different from the public judgments of the Romans. This was owing to their not knowing how to write; a thing in those days very common. The usage of writing fixes the ideas, and keeps the secret; but when this usage is laid aside, nothing but the notoriety of the proceeding is capable of fixing those ideas.

And as uncertainty might easily arise in respect to what had been adjudicated by vassals, or pleaded before them, they could, therefore, refresh their memory[u] every time they held a court by what were called proceedings on record.[v] In that case, it was not allowed to challenge the witnesses to combat; for then there would be no end of disputes.

s Of the Parliaments of France, book XII. chap. xvi.

t Chap. lxi. p. 315.

u As Beaumanoir says, chap. xxxix. p. 209.

v They proved by witnesses what had been already done, said, or decreed in court.

In process of time a private form of proceeding was introduced. Everything before had been public; everything now became secret; the interrogatories, the informations, the re-examinations, the confronting of witnesses, the opinion of the attorney-general; and this is the present practice. The first form of proceeding was suitable to the government of that time, as the new form was proper to the government since established.

Boutillier's commentator fixes the epoch of this change to the ordinance in the year 1539. I am apt to believe that the change was made insensibly, and passed from one lordship to another, in proportion as the lords renounced the ancient form of judging, and that derived from the Institutions of St. Louis was improved. And, indeed, Beaumanoir says[w] that witnesses were publicly heard only in cases in which it was allowed to give pledges of battle: in others they were heard in secret, and their depositions were reduced to writing. The proceedings became, therefore, secret, when they ceased to give pledges of battle.

35.—*Of the Costs*

In former times no one was condemned in the lay courts of France to the payment of costs.[x] The party cast was sufficiently punished by pecuniary fines to the lord and his peers. From the manner of proceeding by judicial combat it followed, that the party condemned and deprived of life and fortune was punished as much as he could be: and in the other cases of the judicial combat, there were fines sometimes fixed, and sometimes dependent on the disposition of the lord, which were sufficient to make people dread the consequences of suits. The same may be said of causes that were not decided by combat. As the lord had the chief profits, so he was also at the chief expense, either to assemble his peers, or to enable them to proceed to judgment. Besides, as disputes were generally determined at the same place, and almost always at the same time, without that infinite multitude of writings which afterwards followed, there was no necessity of allowing costs to the parties.

The custom of appeals naturally introduced that of giving costs. Thus Défontaines says,[y] that when they appealed by

[w] Chap. xxxix. p. 218.

[x] Défontaines in his counsel, chap. xxii. arts. 3 and 8; and Beaumanoir, chap. xxxiii. "Institutions," book I. chap. xc.

[y] Chap. xxii. art. 8.

written law, that is, when they followed the new laws of St. Louis, they gave costs; but that in the ordinary practice, which did not permit them to appeal without falsifying the judgment, no costs were allowed. They obtained only a fine, and the possession for a year and a day of the thing contested, if the cause was remanded to the lord.

But when the number of appeals increased from the new facility of appealing; [z] when by the frequent usage of those appeals from one court to another, the parties were continually removed from the place of their residence; when the new method of procedure multiplied and prolonged the suits; when the art of eluding the very justest demands became refined; when the parties at law knew how to fly only in order to be followed; when plaints were ruinous and defence easy; when the arguments were lost in whole volumes of words and writings; when the kingdom was filled with limbs of the law, who were strangers to justice; when knavery found encouragement at the very place where it did not find protection; then it was necessary to deter litigious people by the fear of costs. They were obliged to pay costs for the judgment and for the means they had employed to elude it. Charles the Fair, made a general ordinance on that subject.[a]

36.—*Of the public Prosecutor*

As by the Salic, Ripuarian, and other barbarous laws, crimes were punished with pecuniary fines; they had not in those days, as we have at present, a public officer who had the care of criminal prosecutions. And, indeed, the issue of all causes being reduced to the reparation of injuries, every prosecution was in some measure civil, and might be managed by anyone. On the other hand, the Roman law had popular forms for the prosecution of crimes which were inconsistent with the functions of a public prosecutor.

The custom of judicial combats was no less opposite to this idea; for who is it that would choose to be a public prosecutor and to make himself every man's champion against all the world?

I find in the collection of formulas, inserted by Muratori in the laws of the Lombards, that under our princes of the second race there was an advocate for the public prosecutor.[b] But who-

[z] At present when they are so inclined to appeal, says Boutillier.—"Somme Rurale," book I. tit. 3, p. 16.

[a] In the year 1324.

[b] "Advocatus de parte publicâ."

ever pleases to read the entire collection of these formulas will find that there was a total difference between such officers and those we now call the public prosecutor, our attorneys-general, our king's solicitors, or our solicitors for the nobility. The former were rather agents to the public for the management of political and domestic affairs, than for the civil. And, indeed, we did not find in those formulas that they were intrusted with criminal prosecutions, or with causes relating to minors, to churches, or to the condition of anyone.

I said that the establishment of a public prosecutor was repugnant to the usage of judicial combats. I find, notwithstanding, in one of those formulas, an advocate for the public prosecutor, who had the liberty to fight. Muratori has placed it just after the constitution of Henry I, for which it was made.[c] In this constitution it is said, "That if any man kills his father, his brother, or any of his other relatives, he shall lose their succession, which shall pass to the other relatives, and his own property shall go to the exchequer." Now it was in suing for the estate which had devolved to the exchequer, that the advocate for the public prosecutor, by whom its rights were defended, had the privilege of fighting: this case fell within the general rule.

We see in those formulas the advocate for the public prosecutor proceeding against a person who had taken a robber, but had not brought him before the count;[d] against another who had raised an insurrection or tumult against the count;[e] against another who had saved a man's life whom the count had ordered to be put to death;[f] against the advocate of some churches, whom the count had commanded to bring a robber before him, but had not obeyed;[g] against another who had revealed the king's secret to strangers;[h] against another, who with open violence had attacked the emperor's commissary;[i] against another who had been guilty of contempt to the emperor's rescripts, and he was prosecuted either by the emperor's advocate or by the emperor himself;[j] against another, who refused to accept of the prince's coin;[k] in fine, this advocate sued for things, which by the law were adjudged to the exchequer.[l]

[c] See this constitution and this formula, in the second volume of the "Historians of Italy," p. 175.
[d] Collection of Muratori, p. 104, on the 88th law of Charlemagne, book I. tit. 26, sec. 4[a].
[e] Another formula, ibid. p. 7.
[f] Ibid. p. 104.
[g] Collection of Muratori, p. 95.
[h] Ibid. p. 88.
[i] Ibid. p. 98.
[j] Ibid. p. 132.
[k] Ibid.
[l] Ibid. p. 137.

But in criminal causes, we never meet with the advocate for the public prosecutor; not even where duels are used;[m] not even in the case of incendiaries;[n] not even when the judge is killed on his bench;[o] not even in causes relating to the conditions of persons,[p] to liberty and slavery.[q]

These formulas are made, not only for the laws of the Lombards, but likewise for the capitularies added to them, so that we have no reason to doubt of their giving us the practice observed with regard to this subject under our princes of the second race.

It is obvious, that these advocates for a public prosecutor must have ended with our second race of kings, in the same manner as the king's commissioners in the provinces; because there was no longer a general law nor general exchequer, and because there were no longer any counts in the provinces to hold the assizes, and, of course, there were no more of those officers, whose principal function was to support the authority of the counts.

As the usage of combats became more frequent under the third race, it did not allow of any such thing as a public prosecutor. Hence Boutillier, in his "Somme Rurale," speaking of the officers of justice, takes notice only of the bailiffs, the peers, and sergeants. See the Institutions,[r] and Beaumanoir,[s] concerning the manner in which prosecutions were managed in those days.

I find in the laws of James II, King of Majorca,[t] a creation of the office of king's attorney-general, with the very same functions as are exercised at present by the officers of that name among us.[u] It is manifest that this office was not instituted till we had changed the form of our judiciary proceedings.

37.—*In what Manner the Institutions of St. Louis fell into Oblivion*

It was the fate of the Institutions, that their origin, progress, and decline were comprised within a very short period.

I shall make a few reflections upon this subject. The code we have now under the name of St. Louis's Institutions was never designed as a law for the whole kingdom, though such a

m Collection of Muratori, p. 147.
n Ibid.
o Ibid. p. 168.
p Ibid. p. 134
q Ibid. p. 107.
r Book I. chap. i.; and book II. chaps. xi. and xiii.
s Cap. i. and lxi.
t See these laws in the "Lives of the Saints," of the month of June, tom. iii. p. 26.
u "Qui continue nostram sacram curiam sequi teneatur, instituatur qui facta et causas in ipsa curia promoveat atque prosequatur"

design is mentioned in the preface. The compilation is a general code, which determines all points relating to civil affairs, to the disposal of property by will or otherwise, the dowries and privileges of women, and emoluments and privileges of fiefs, with the affairs in relation to the police, etc. Now, to give a general body of civil laws, at a time when each city, town, or village, had its customs, was attempting to subvert in one moment all the particular laws then in force in every part of the kingdom. To reduce all the particular customs to a general one would be a very inconsiderate thing, even at present when our princes find everywhere the most passive obedience. But if it be true that we ought not to change when the inconveniences are equal to the advantages, much less should we change when the advantages are small and the inconveniences immense. Now, if we attentively consider the situation which the kingdom was in at that time, when every lord was puffed up with the notion of his sovereignty and power, we shall find that to attempt a general alteration of the received laws and customs must be a thing that could never enter into the heads of those who were then in the administration.

What I have been saying proves likewise that this code of institutions was not confirmed in parliament by the barons and magistrates of the kingdom, as is mentioned in a manuscript of the town-hall of Amiens, quoted by M. Ducange.[v] We find in other manuscripts that this code was given by St. Louis in the year 1270, before he set out for Tunis. But this fact is not truer than the other; for St. Louis set out upon that expedition in 1269, as M. Ducange observes: whence he concludes, that this code might have been published in his absence. But this I say is impossible. How can St. Louis be imagined to have pitched upon the time of his absence for transacting an affair which would have been a sowing of troubles, and might have produced not only changes, but revolutions? An enterprise of that kind had need, more than any other, of being closely pursued, and could not be the work of a feeble regency, composed moreover of lords, whose interest it was that it should not succeed. These were Matthew, Abbot of St. Denis, Simon of Clermont, Count of Nesle, and, in case of death, Philip, Bishop of Evreux, and John, Count of Ponthieu. We have seen above [w]

[v] Preface to the "Institutions." [w] Chap. xxix.

that the Count of Ponthieu opposed the execution of a new judiciary order in his lordship.

Thirdly, I affirm it to be very probable, that the code now extant is quite a different thing from St. Louis's Institutions. It cites the Institutions, therefore it is a comment upon the Institutions, and not the Institutions themselves. Besides, Beaumanoir, who frequently makes mention of St. Louis's Institutions, quotes only some particular laws of that prince, and not this compilation. Défontaines,[x] who wrote in that prince's reign, makes mention of the first two times that his Institutions on judicial proceedings were put in execution, as of a thing long since elapsed. The Institutions of St. Louis were prior, therefore, to the compilation I am now speaking of, which from their rigor, and their adopting the erroneous prefaces inserted by some ignorant persons in that work, could not have been published before the last year of St. Louis or even not till after his death.

38.—*The same Subject continued*

What is this compilation then which goes at present under the name of St. Louis's Institutions? What is this obscure, confused, and ambiguous code, where the French law is continually mixed with the Roman, where a legislator speaks and yet we see a civilian, where we find a complete digest of all cases and points of the civil law? To understand this thoroughly, we must transfer ourselves in imagination to those times.

St. Louis, seeing the abuses in the jurisprudence of his time, endeavored to give the people a dislike to it. With this view he made several regulations for the court of his demesnes, and for those of his barons. And such was his success that Beaumanoir, who wrote a little after the death of that prince, informs us [y] that the manner of trying causes which had been established by St. Louis obtained in a great number of the courts of the barons.

Thus this prince attained his end, though his regulations for the courts of the lords were not designed as a general law for the kingdom, but as a model which everyone might follow, and would even find his advantage in it. He removed the bad practice by showing them a better. When it appeared that his courts, and those of some lords, had chosen a form of proceeding more

[x] See above, chap. xxix. [y] Chap. lxi. p. 309.

natural, more reasonable, more conformable to morality, to religion, to the public tranquillity, and to the security of person and property, this form was soon adopted, and the other rejected.

To allure when it is rash to constrain, to win by pleasing means when it is improper to exert authority, shows the man of abilities. Reason has a natural, and even a tyrannical sway; it meets with resistance, but this very resistance constitutes its triumph; for after a short struggle it commands an entire submission.

St. Louis, in order to give a distaste of the French jurisprudence, caused the books of the Roman law to be translated; by which means they were made known to the lawyers of those times. Defontaines, who is the oldest law writer we have, made great use of those Roman laws.[z] His work is, in some measure, a result from the ancient French jurisprudence, of the laws or Institutions of St. Louis, and of the Roman law. Beaumanoir made very little use of the latter; but he reconciled the ancient French laws to the regulations of St. Louis.

I have a notion, therefore, that the law book, known by the name of the Institutions, was compiled by some bailiffs, with the same design as that of the authors of those two works, and especially of Défontaines. The title of this work mentions that it is written according to the usage of Paris, Orleans, and the court of barony; and the preamble says that it treats of the usage of the whole kingdom, of Anjou, and of the court of barony. It is plain that this work was made for Paris, Orleans, and Anjou, as the works of Beaumanoir and Défontaines were framed for the counties of Clermont and Vermandois; and as it appears from Beaumanoir that divers laws of St. Louis had been received in the courts of barony, the compiler was in the right to say that his work related also to those courts.[a]

It is manifest that the person who composed this work compiled the customs of the country together with the laws and Institutions of St. Louis. This is a very valuable work, because it contains the ancient customs of Anjou, the Institutions of St.

[z] He says of himself, in his prologue, "Nus huy en prit onques mais cette chose dont j ay."

[a] Nothing so vague as the title and prologue. At first they are the customs of Paris, Orleans, and the court of barony; then they are the customs of all the lay courts of the kingdom, and of the provostships of France, at length, they are the customs of the whole kingdom, Anjou, and the court of barony.

Louis, as they were then in use; and, in fine, the whole practice of the ancient French law.

The difference between this work, and those of Défontaines and Beaumanoir is, its speaking in imperative terms as a legislator; and this might be right, since it was a medley of written customs and laws.

There was an intrinsic defect in this compilation; it formed an amphibious code, in which the French and Roman laws were mixed, and where things were joined that were in no relation, but often contradictory to each other.

I am not ignorant that the French courts of vassals or peers, the judgments without power of appealing to another tribunal, the manner of pronouncing sentence by these words, "I condemn" or "I absolve," [b] had some conformity to the popular judgments of the Romans. But they made very little use of that ancient jurisprudence; they rather chose that which was afterwards introduced by the emperor, in order to regulate, limit, correct, and extend the French jurisprudence.

39.—*The same Subject continued*

The judiciary forms introduced by St. Louis fell into disuse. This prince had not so much in view the thing itself, that is, the best manner of trying causes, as the best manner of supplying the ancient practice of trial. The principal intent was to give a disrelish of the ancient jurisprudence, and the next to form a new one. But when the inconveniences of the latter appeared, another soon succeeded.

The Institutions of St. Louis did not, therefore, so much change the French jurisprudence, as they afforded the means of changing it; they opened new tribunals, or rather ways to come at them. And when once the public had easy access to the superior courts, the judgments which before constituted only the usages of a particular lordship formed a universal digest. By means of the Institutions, they had obtained general decisions, which were entirely wanting in the kingdom; when the building was finished, they let the scaffold fall to the ground.

Thus the Institutions produced effects which could hardly be expected from a masterpiece of legislation. To prepare great

[b] "Institutions," book II. chap. xv.

changes whole ages are sometimes requisite; the events ripen, and the revolutions follow.

The Parliament judged in the last resort of almost all the affairs of the kingdom. Before,[c] it took cognizance only of disputes between the dukes, counts, barons, bishops, abbots, or between the king and his vassals,[d] rather in the relation they bore to the political than to the civil order. They were soon obliged to render it permanent, whereas it used to be held only a few times in a year: and, in fine, a great number were created, in order to be sufficient for the decision of all manner of causes.

No sooner had the Parliament become a fixed body, than they began to compile its decrees. John de Monluc, in the reign of Philip the Fair, made a collection which at present is known by the name of the Olim registers.[e]

40.—*In what Manner the judiciary Forms were borrowed from the Decretals*

But how comes it, some will ask, that when the Institutions were laid aside the judicial forms of the canon law should be preferred to those of the Roman? It was because they had constantly before their eyes the ecclesiastic courts, which followed the forms of the canon law, and they knew of no court that followed those of the Roman law? Besides, the limits of the spiritual and temporal jurisdiction were at that time very little understood; there were people who sued indifferently [f]and causes that were tried indifferently, in either court.[g] It seems[h] as if the temporal jurisdiction reserved no other cases exclusively to itself than the judgment of feudal matters,[i] and of such crimes committed by laymen as did not relate to religion. For[j] if, on account of conventions and contracts, they had occasion to sue in a temporal court, the parties might of their own accord proceed before the spiritual tribunals; and as the latter had not a power to oblige the temporal court to execute the sentence, they com-

c See Du Tillet on the court of peers. See also Larocheflavin, book I chap. iii., Budeus and Paulus Æmilius.

d Other causes were decided by the ordinary tribunals.

e See the President Henault's excellent abridgment of the "History of France" in the year 1313.

f Beaumanoir, chap. xi. p. 58.

g Widows, croises, etc. Beaumanoir, chap. xi. p. 58.

h See the whole eleventh chapter of Beaumanoir.

i The spiritual tribunals had even laid hold of these, under the pretext of the oath, as may be seen by the famous Concordat between Philip Augustus, the clergy, and the barons, which is to be found in the Ordinances of Laurière.

j Beaumanoir, chap. xi. p. 60.

manded submission by means of excommunications. Under those circumstances, when they wanted to change the course of proceedings in the temporal court, they took that of the spiritual tribunals, because they knew it; but did not meddle with that of the Roman law, by reason they were strangers to it: for in point of practice people know only what is really practised.

41.—*Flux and Reflux of the ecclesiastic and temporal Jurisdiction*

The civil power being in the hands of an infinite number of lords, it was an easy matter for the ecclesiastic jurisdiction to gain daily a greater extent. But as the ecclesiastic courts weakened those of the lords, and contributed thereby to give strength to the royal jurisdiction, the latter gradually checked the jurisdiction of the clergy. The Parliament, which in its form of proceedings had adopted whatever was good and useful in the spiritual courts, soon perceived nothing else but the abuses which had crept into those tribunals; and as the royal jurisdiction gained ground every day, it grew every day more capable of correcting those abuses. And, indeed, they were intolerable; without enumerating them I shall refer the reader to Beaumanoir, to Boutillier, and to the ordinances of our kings.[k] I shall mention only two, in which the public interest was more directly concerned. These abuses we know by the decrees that reformed them; they had been introduced in the times of the darkest ignorance, and upon the breaking out of the first gleam of light, they vanished. From the silence of the clergy it may be presumed that they forwarded this reformation: which, considering the nature of the human mind, deserves commendation. Every man that died without bequeathing a part of his estate to the church, which was called dying without confession, was deprived of the sacrament and of Christian burial. If he died intestate, his relatives were obliged to prevail upon the bishop that he would, jointly with them, name proper arbiters to determine what sum the deceased ought to have given, in case he had made a will. People could not lie together the first night of their nuptials, or even the two following nights without having previously purchased

[k] See Boutillier, "Somme Rurale," tit. 9, what persons are incapable of suing in a temporal court; and Beaumanoir, chap. xi. p. 56, and the regulations of Philip Augustus upon this subject; as also the regulation between Philip Augustus, the clergy, and the barons.

leave; these, indeed, were the best three nights to choose; for as to the others, they were not worth much. All this was redressed by the Parliament: we find in the glossary of the French law,[l] by Ragneau, the decree which it published against the Bishop of Amiens.[m]

I return to the beginning of my chapter. Whenever we observe in any age or government the different bodies of the state endeavoring to increase their authority, and to take particular advantages of each other, we should be often mistaken were we to consider their enroachments as an evident mark of their corruption. Through a fatality inseparable from human nature, moderation in great men is very rare: and as it is always much easier to push on force in the direction in which it moves than to stop its movement, so in the superior class of the people, it is less difficult, perhaps, to find men extremely virtuous, than extremely prudent.

The human mind feels such an exquisite pleasure in the exercise of power; even those who are lovers of virtue are so excessively fond of themselves that there is no man so happy as not still to have reason to mistrust his honest intentions; and, indeed, our actions depend on so many things that it is infinitely easier to do good, than to do it well.

42.—*The Revival of the Roman Law, and the Result thereof. Change of Tribunals*

Upon the discovery of Justinian's digest towards the year 1137, the Roman law seemed to rise out of its ashes. Schools were then established in Italy, where it was publicly taught; they had already the Justinian code and the *Novellæ*. I mentioned before, that this code had been so favorably received in that country as to eclipse the law of the Lombards.

The Italian doctors brought the law of Justinian into France, where they had only the Theodosian code;[n] because Justinian's laws were not made till after the settlement of the barbarians in Gaul.[o] This law met with some opposition: but it stood its ground notwithstanding the excommunications of the popes,

[l] In the words "testamentary executors."

[m] The 19th of March, 1409.

[n] In Italy they followed Justinian's code; hence Pope John VIII in his constitution published after the Synod of Troyes makes mention of this code, not because it was known in France, but because he knew it himself, and his constitution was general.

[o] This Emperor's code was published towards the year 530.

who supported their own canons.[p] St. Louis endeavored to bring it into repute by the translations of Justinian's works, made according to his orders, which are still in manuscript in our libraries; and I have already observed, that they made great use of them in compiling the Institutions. Philip the Fair ordered the laws of Justinian to be taught only as written reason in those provinces of France that were governed by customs; and they were adopted as a law in those provinces where the Roman law had been received.[q]

I have already noticed that the manner of proceeding by judicial combat required very little knowledge in the judges; disputes were decided according to the usage of each place, and to a few simple customs received by tradition. In Beaumanoir's time there were two different ways of administering justice;[r] in some places they tried by peers,[s] in others by bailiffs: in following the former way, the peers gave judgment according to the practice of their court; in the latter, it was the *prud'hommes*, or old men, who pointed out this same practice to the bailiffs.[t] This whole proceeding required neither learning, capacity, nor study. But when the dark code of the Institutions made its appearance; when the Roman law was translated and taught in public schools; when a certain art of procedure and jurisprudence began to be formed; when practitioners and civilians were seen to rise, the peers and the *prud'hommes* were no longer capable of judging: the peers began to withdraw from the lords' tribunals; and the lords were very little inclined to assemble them; especially as the new form of trial, instead of being a solemn proceeding, agreeable to the nobility and interesting to a warlike people, had become a course of pleading which they neither understood, nor cared to learn. The custom of trying by peers began to be less used;[u] that of trying by bailiffs to be more so; the bailiffs did not give judgment themselves,[v] they summed up the evidence

[p] Decretals, book V. tit. "de privilegiis," capite "super specula."

[q] By a charter in the year 1312, in favor of the university of Orleans, quoted by Du Tillet.

[r] "Customs of Beauvoisis," chap. i., of the office of bailiffs.

[s] Among the common people the burghers were tried by burghers, as the feudatory tenants were tried by one another. See La Thaumassière, chap. xix.

[t] Thus all requests began with these words: "My lord judge, it is customary that in your court," etc., as appears from the formula quoted by Boutillier, "Somme Rurale," book IV. tit. xxi.

[u] The change was insensible; we meet with trials by peers, even in Boutillier's time, who lived in the year 1402, which is the date of his will. He gives this formula, book I. tit. 21, "Sire Juge, en ma justice haute, moyenne et basse, qui j'ai en tel lieu, cour, plaids, baillis, hommes, feodaux et sergens." Yet nothing but feodal matters were tried any longer by the peers. Ibid. book I. tit. i. p. 16.

[v] As appears by the formula of the

and pronounced the judgment of the *prud'hommes;* but the latter being no longer capable of judging, the bailiffs themselves gave judgment.

This was effected so much the easier, as they had before their eyes the practice of the ecclesiastic courts; the canon and new civil law both concurred alike to abolish the peers.

Thus fell the usage hitherto constantly observed in the French monarchy, that judgment should not be pronounced by a single person, as may be seen in the Salic laws, the Capitularies, and in the first law-writers under the third race.[w] The contrary abuse which obtains only in local jurisdictions has been moderated, and in some measure redressed, by introducing in many places a judge's deputy, whom he consults, and who represents the ancient *prud'hommes* by the obligation the judge is under of taking two graduates in cases that deserve a corporal punishment; and, in fine, it has become of no effect by the extreme facility of appeals.

43.—*The same Subject continued*

Thus there was no law to prohibit the lords from holding their courts themselves; none to abolish the functions of their peers; none to ordain the creation of bailiffs; none to give them the power of judging. All this was effected insensibly, and by the very necessity of the thing. The knowledge of the Roman law, the decrees of the courts, the new digest of the customs, required a study of which the nobility and illiterate people were incapable.

The only ordinance we have upon this subject is that which obliged the lords to choose their bailiffs from among the laity.[x] It is a mistake to look upon this as a law of their creation; for it says no such thing. Besides, the intention of the legislator is determined by the reasons assigned in the ordinance: "to the end that the bailiffs may be punished for their prevarications it is

letters which their lord used to give them, quoted by Boutillier, "Somme Rurale," book I. tit. xiv., which is proved likewise by Beaumanoir, "Custom of Beauvoisis," chapter i., of the bailiffs; they only directed the proceedings. "The bailiff is obliged in the presence of the peers to take down the words of those who plead, and to ask the parties whether they are willing to have judgment given according to the reasons alleged; and if they say, yes, my lord; the bailiff ought to oblige the peers to give judgment." See also the "Institutions" of St. Louis, book I. chap. cv., and book II. chap. xv. "Li Juge si ne doit pas faire le jugement."

[w] Beaumanoir, chap. lxvii. p. 336, and chap. lxi. pp. 315 and 316. The "Institutions," book II. chap. xv.

[x] It was published in the year 1287.

necessary they be taken from the order of the laity." [y] The immunities of the clergy in those days are very well known.

We must not imagine that the privileges which the nobility formerly enjoyed, and of which they are now divested, were taken from them as usurpations; no, many of those privileges were lost through neglect, and others were given up, because as various changes had been introduced in the course of so many ages, they were inconsistent with those changes.

44.—*Of the Proof by Witnesses*

The judges, who had no other rule to go by than the usages, inquired very often by witnesses into every cause that was brought before them.

The usage of judicial combats beginning to decline, they made their inquests in writing. But a verbal proof committed to writing is never more than a verbal proof; so that this only increased the expenses of law proceedings. Regulations were then made which rendered most of those inquests useless; [z] public registers were established which ascertained most facts, as nobility, age, legitimacy, and marriage. Writing is a witness very hard to corrupt; the customs were therefore reduced to writing. All this is very reasonable; it is much easier to go and see in the baptismal register, whether Peter is the son of Paul than to prove this fact by a tedious inquest. When there are a number of usages in a country it is much easier to write them all down in a code, than to oblige individuals to prove every usage. At length the famous ordinance was made, which prohibited the admitting of the proof by witnesses for a debt exceeding an hundred livres, except there was the beginning of a proof in writing.

45.—*Of the Customs of France*

France, as we have already observed, was governed by written customs, and the particular usages of each lordship constituted the civil law. Every lordship had its civil law, according to Beaumanoir,[a] and so particular a law, that this author, who is

[y] "Ut si ibi delinquant, superiores sui possint animadvertere in eosdem."

[z] See in what manner age and parentage were proved.—"Institutions," book I. chaps. lxxi. and lxxii.

[a] Prologue to the "Custom of Beauvoisis."

looked upon as a luminary, and a very great luminary of those times, says he does not believe that throughout the whole kingdom there were two lordships entirely governed by the same law.

This prodigious diversity had a twofold origin. With regard to the first, the reader may recollect what has been already said concerning it in the chapter of local customs:[b] and as to the second we meet with it in the different events of legal duels, it being natural that a continual series of fortuitous cases must have been productive of new usages.

These customs were preserved in the memory of old men, but insensibly laws or written customs were formed.

1. At the commencement of the third race, the kings gave not only particular charters, but likewise general ones, in the manner above explained; such are the Institutions of Philip Augustus and those made by St. Louis. In like manner the great vassals, in concurrence with the lords who held under them, granted certain charters or establishments, according to particular circumstances at the assizes of their duchies or counties; such were the assize of Godfrey, Count of Brittany, on the division of the nobles; the customs of Normandy, granted by Duke Ralph; the customs of Champagne, given by King Theobald; the laws of Simon, Count of Montfort, and others. This produced some written laws, and even more general ones than those they had before.

2. At the beginning of the third race, almost all the common people were bondmen; but there were several reasons which afterwards determined the kings and lords to enfranchise them.

The lords by enfranchising their bondmen gave them property; it was necessary therefore to give them civil laws, in order to regulate the disposal of that property. But by enfranchising their bondmen, they likewise deprived themselves of their property; there was a necessity, therefore, of regulating the rights which they reserved to themselves, as an equivalent for that property. Both these things were regulated by the charters of enfranchisement; those charters formed a part of our customs, and this part was reduced to writing.[c]

3. Under the reign of St. Louis, and of the succeeding princes, some able practitioners, such as Défontaines, Beaumanoir, and

[b] Chap. xii. [c] See the "Collection of Ordinances," by Laurière.

others, committed the customs of their bailiwicks to writing. Their design was rather to give the course of judicial proceedings, than the usages of their time in respect to the disposal of property. But the whole is there, and though these particular authors have no authority but what they derive from the truth and notoriety of the things they speak of, yet there is no manner of doubt but that they contributed greatly to the restoration of our ancient French jurisprudence. Such was in those days our common law.

We have come now to the grand epoch. Charles VII and his successors caused the different local customs throughout the kingdom to be reduced to writing, and prescribed set forms to be observed to their digesting. Now, as this digesting was made through all the provinces, and as people came from each lordship to declare in the general assembly of the province the written or unwritten usages of each place, endeavors were made to render the customs more general, as much as possible, without injuring the interests of individuals, which were carefully preserved.[d] Thus our customs were characterized in a threefold manner; they were committed to writing, they were made more general, and they received the stamp of the royal authority.

Many of these customs having been digested anew, several changes were made either in suppressing whatever was incompatible with the actual practice of the law, or in adding several things drawn from this practice.

Though the common law is considered among us as in some measure opposite to the Roman, insomuch that these two laws divide the different territories, it is, notwithstanding, true that several regulations of the Roman law entered into our customs, especially when they made the new digests, at a time not very distant from ours, when this law was the principal study of those who were designed for civil employments, at a time when it was not usual for people to boast of not knowing what it was their duty to know, and of knowing what they ought not to know, at a time when a quickness of understanding was made more subservient to learning than pretending to a profession, and when a continual pursuit of amusements was not even the characteristic of women.

[d] This was observed at the digesting of the customs of Berry and of Paris. See La Thaumassière, chap. iii.

I should have been more diffuse at the end of this book, and, entering into the several details, should have traced all the insensible changes, which from the opening of appeals have formed the great *corpus* of our French jurisprudence. But this would have been ingrafting one large work upon another. I am like that antiquarian [e] who set out from his own country, arrived in Egypt, cast an eye on the Pyramids and returned home.

[e] In the "Spectator."

BOOK XXIX

OF THE MANNER OF COMPOSING LAWS

1.—*Of the Spirit of a Legislator*

I SAY it, and methinks I have undertaken this work with no other view than to prove it, the spirit of a legislator ought to be that of moderation; political, like moral good, lying always between two extremes.[a] Let us produce an example.

The set forms of justice are necessary to liberty, but the number of them might be so great as to be contrary to the end of the very laws that established them; processes would have no end; property would be uncertain; the goods of one of the parties would be adjudged to the other without examining, or they would both be ruined by examining too much.

The citizens would lose their liberty and security, the accusers would no longer have any means to convict, nor the accused to justify themselves.

2.—*The same Subject continued*

Cecilius, in Aulus Gellius,[b] speaking of the law of the Twelve Tables which permitted the creditor to cut the insolvent debtor into pieces, justifies it even by its cruelty, which hindered people from borrowing beyond their ability of paying.[c] Shall then the cruellest laws be the best? Shall goodness consist in excess, and all the relations of things be destroyed?

3.—*That the Laws which seem to deviate from the Views of the Legislator are frequently agreeable to them*

The law of Solon which declared those persons infamous who espoused no side in an insurrection seemed very extra-

a Arist. "Polit." I.

b Book XXII. chap. i.

c Cecilius says, that he never saw nor read of an instance, in which this punishment had been inflicted: but it is likely that no such punishment was ever established: the opinion of some civilians, that the law of the Twelve Tables meant only the division of the money arising from the sale of the debtor, seems very probable.

ordinary; but we ought to consider the circumstances in which Greece was at that time. It was divided into very small states; and there was reason to apprehend lest in a republic torn by intestine divisions the soberest part should keep retired, in consequence of which things might be carried to extremity.

In the seditions raised in those petty states the bulk of the citizens either made or engaged in the quarrel. In our large monarchies parties are formed by a few, and the people choose to live quietly. In the latter case it is natural to call back the seditious to the bulk of the citizens, and not these to the seditious; in the other it is necessary to oblige the small number of prudent people to enter among the seditious; it is thus the fermentation of one liquor may be stopped by a single drop of another.

4.—*Of the Laws contrary to the Views of the Legislator*

There are laws so little understood by the legislator as to be contrary to the very end he proposed. Those who made this regulation among the French, that when one of the two competitors died the benefice should devolve to the survivor, had in view without doubt the extinction of quarrels; but the very reverse falls out, we see the clergy at variance every day, and like English mastiffs worrying one another to death.

5.—*The same Subject continued*

The law I am going to speak of is to be found in this oath preserved by Æschines:[d] "I swear that I will never destroy a town of the Amphictyones, and that I will not divert the course of its running waters; if any nation shall presume to do such a thing, I will declare war against them and will destroy their towns." The last article of this law, which seems to confirm the first, is really contrary to it. Amphictyon is willing that the Greek towns should never be destroyed, and yet his law paves the way for their destruction. In order to establish a proper law of nations among the Greeks, they ought to have been accustomed early to think it a barbarous thing to destroy a Greek town; consequently they ought not even to ruin the destroyers. Amphictyon's law was just, but it was not prudent; this appears even from the abuse made of it. Did not

[d] "De falsa Legatione."

Philip assume the power of demolishing towns, under the pretence of their having infringed the laws of the Greeks? Amphictyon might have inflicted other punishments; he might have ordained, for example, that a certain number of the magistrates of the destroying town, or of the chiefs of the infringing army, should be punished with death; that the destroying nation should cease for a while to enjoy the privileges of the Greeks; that they should pay a fine till the town was rebuilt. The law ought, above all things, to aim at the reparation of damages.

6.—*The Laws which appear the same have not always the same Effect*

Cæsar made a law to prohibit people from keeping above sixty sesterces in their houses.[e] This law was considered at Rome as extremely proper for reconciling the debtors to their creditors, because, by obliging the rich to lend to the poor, they enabled the latter to pay their debts. A law of the same nature made in France at the time of the System proved extremely fatal, because it was enacted under a most frightful situation. After depriving people of all possible means of laying out their money, they stripped them even of the last resource of keeping it at home, which was the same as taking it from them by open violence. Cæsar's law was intended to make the money circulate; the French Minister's design was to draw all the money into one hand. The former gave either lands or mortgages on private people for the money; the latter proposed in lieu of money nothing but effects which were of no value, and could have none by their very nature, because the law compelled people to accept of them.

7.—*The same Subject continued. Necessity of composing Laws in a proper Manner*

The law of ostracism was established at Athens, at Argos,[f] and at Syracuse. At Syracuse it was productive of a thousand mischiefs, because it was imprudently enacted. The principal citizens banished one another by holding the leaf of a fig-tree in their hands,[g] so that those who had any kind of merit with-

[e] Dio. lib. XLI.
[f] Arist. "Repub." lib. V. chap. iii.
[g] Plutarch and Diodorus of Sicily say it was an olive leaf. See Diod. XI.—Ed.

drew from public affairs.[h] At Athens, where the legislator was sensible of the proper extent and limits of his law, ostracism proved an admirable regulation. They never condemned more than one person at a time; and such a number of suffrages were requisite for passing this sentence, that it was extremely difficult for them to banish a person whose absence was not necessary to the state.[i]

The power of banishing was exercised only every fifth year: and, indeed, as the ostracism was designed against none but great personages who threatened the state with danger, it ought not to have been the transaction of every day.

8.—*That Laws which appear the same were not always made through the same Motive*

In France they have received most of the Roman laws on substitutions, but through quite a different motive from the Romans. Among the latter the inheritance was accompanied with certain sacrifices[j] which were to be performed by the inheritor and were regulated by the pontifical law; hence it was that they reckoned it a dishonor to die without heirs, that they made slaves their heirs, and that they devised substitutions. Of this we have a very strong proof in the vulgar substitution, which was the first invented, and took place only when the heir appointed did not accept of the inheritance. Its view was not to perpetuate the estate in a family of the same name, but to find somebody that would accept of it.

9.—*That the Greek and Roman Laws punished Suicide, but not through the same Motive*

A man, says Plato, who has killed one nearly related to him, that is, himself, not by an order of the magistrate, not to avoid ignominy, but through pusillanimity, shall be punished.[k] The Roman law punished this action when it was not committed through pusillanimity, through weariness of life, through impatience in pain, but from a criminal despair. The Roman law acquitted where the Greek condemned, and condemned where the other acquitted.

h Plutarch, "Life of Dionysius."
i Vide book XXVI. chap. 17.
j When the inheritance was too much encumbered they eluded the pontifical law by certain sales, whence come the words "sine sacris hæreditas."
k Book IX. "of Laws."

Plato's law was formed upon the Lacedæmonian institutions, where the orders of the magistrate were absolute, where shame was the greatest of miseries, and pusillanimity the greatest of crimes. The Romans had no longer those refined ideas; theirs was only a fiscal law.

During the time of the republic, there was no law at Rome against suicides; this action is always considered by their historians in a favorable light, and we never meet with any punishment inflicted upon those who committed it.

Under the first emperors, the great families of Rome were continually destroyed by criminal prosecutions. The custom was then introduced of preventing judgment by a voluntary death. In this they found a great advantage: they had an honorable interment, and their wills were executed, because there was no law against suicides.[l] But when the emperors became as avaricious as cruel, they deprived those who destroyed themselves of the means of preserving their estates by rendering it criminal for a person to make away with himself through a criminal remorse.

What I have been saying of the motive of the emperors is so true, that they consented that the estates of suicides should not be confiscated when the crime for which they killed themselves was not punished with confiscation.[m]

10.—*That Laws which seem contrary proceed sometimes from the same Spirit*

In our time we give summons to people in their own houses; but this was not permitted among the Romans.[n]

A summons was a violent action,[o] and a kind of warrant for seizing the body;[p] hence it was no more allowed to summon a person in his own house than it is now allowed to arrest a person in his own house for debt.

Both the Roman and our laws admit of this principle alike, that every man ought to have his own house for an asylum, where he should suffer no violence.[q]

l "Eorum qui de se statuebant humabantur corpora, manebant testamenta, pretium festinandi."—Tacit.

m Rescript of the Emperor Pius in the 3d law, secs. 1 and 2 ff. "de bonis eorum qui ante sententiam mortem sibi consciverunt."

n Leg. 18 ff. "de in jus vocando."

o See the law of the Twelve Tables.

p "Rapit in jus," Horace, Satire 9. Hence they could not summon those to whom a particular respect was due.

q See the law 18 ff. "de in jus vocando."

11.—*How to compare two different Systems of Laws*

In France the punishment for false witnesses is capital; in England it is not. Now, to be able to judge which of these two laws is the best, we must add, that in France the rack is used for criminals, but not in England; that in France the accused is not allowed to produce his witnesses, and that they very seldom admit of what are called justifying circumstances in favor of the prisoner; in England they allow of witnesses on both sides. These three French laws form a close and well-connected system; and so do the three English laws. The law of England, which does not allow of the racking of criminals, has but very little hope of drawing from the accused a confession of his crime; for this reason it invites witnesses from all parts, and does not venture to discourage them by the fear of a capital punishment. The French law, which has one resource more, is not afraid of intimidating the witnesses; on the contrary, reason requires they should be intimidated; it listens only to the witnesses on one side, which are those produced by the attorney-general, and the fate of the accused depends entirely on their testimony.[r] But in England they admit of witnesses on both sides, and the affair is discussed in some measure between them; consequently false witness is there less dangerous, the accused having a remedy against the false witness which he has not in France.—Wherefore, to determine which of those systems is most agreeable to reason, we must take them each as a whole and compare them in their entirety.

12.—*That Laws which appear the same are sometimes really different*

The Greek and Roman laws inflicted the same punishment on the receiver as on the thief;[s] the French law does the same. The former acted rationally, but the latter does not. Among the Greeks and Romans the thief was condemned to a pecuniary punishment, which ought also to be inflicted on the receiver; for every man that contributes in what shape soever

[r] By the ancient French law, witnesses were heard on both sides; hence we find in the "Institutions" of St. Louis, book I. chap. vii., that there was only a pecuniary punishment against false witnesses.

[s] Leg. 1 ff. "de Receptatoribus."

to a damage is obliged to repair it. But as the punishment of theft is capital with us, the receiver cannot be punished like the thief without carrying things to excess. A receiver may act innocently on a thousand occasions: the thief is always culpable; one hinders the conviction of a crime, the other commits it; in one the whole is passive, the other is active; the thief must surmount more obstacles, and his soul must be more hardened against the laws.

The civilians have gone further; they look upon the receiver as more odious than the thief,[t] for were it not for the receiver the theft, say they, could not be long concealed. But this again might be right when there was only a pecuniary punishment; the affair in question was a damage done, and the receiver was generally better able to repair it; but when the punishment became capital, they ought to have been directed by other principles.

13.—*That we must not separate Laws from the End for which they were made: of the Roman Laws on Theft*

When a thief was caught in the act this was called by the Romans a manifest theft; when he was not detected till some time afterwards it was a non-manifest theft.

The law of the Twelve Tables ordained that a manifest thief should be whipped with rods and condemned to slavery if he had attained the age of puberty; or only whipped if he was not of ripe age; but as for the non-manifest thief he was only condemned to a fine of double the value of what he had stolen.

When the Porcian laws abolished the custom of whipping the citizens with rods, and of reducing them to slavery, the manifest thief was condemned to a payment of fourfold, and they still continued to condemn the non-manifest thief to a payment of double.[u]

It seems very odd that these laws should make such a difference in the quality of those two crimes, and in the punishments they inflicted. And, indeed, whether the thief was detected either before or after he had carried the stolen goods to the place intended, this was a circumstance which did not alter the nature of the crime. I do not at all question that the whole

[t] Leg. 1 ff. "de Receptatoribus."

[u] See what Favorinus says in Aulus Gellius, book XX. chap. 1.

theory of the Roman laws in relation to theft was borrowed from the Lacedæmonian institutions. Lycurgus, with a view of rendering the citizens dexterous and cunning, ordained that children should be practised in thieving, and that those who were caught in the act should be severely whipped. This occasioned among the Greeks, and afterwards among the Romans, a great difference between a manifest and a non-manifest theft.[a]

Among the Romans a slave who had been guilty of stealing was thrown from the Tarpeian rock. Here the Lacedæmonian institutions were out of the question; the laws of Lycurgus in relation to theft were not made for slaves; to deviate from them in this respect was in reality conforming to them.

At Rome, when a person of unripe age happened to be caught in the act, the pretor ordered him to be whipped with rods according to his pleasure, as was practised at Sparta. All this had a more remote origin. The Lacedæmonians had derived these usages from the Cretans; and Plato,[b] who wants to prove that the Cretan institutions were designed for war, cites the following, namely, the power of bearing pain in individual combats, and in thefts which have to be concealed.

As the civil laws depend on the political institutions, because they are made for the same society, whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand whether they have both the same institutions and the same political law.

Thus when the Cretan laws on theft were adopted by the Lacedæmonians, as their constitution and government were adopted at the same time, these laws were equally reasonable in both nations. But when they were carried from Lacedæmonia to Rome, as they did not find there the same constitution, they were always thought strange, and had no manner of connection with the other civil laws of the Romans.

a Compare what Plutarch says in the "Life of Lycurgus" with the laws of the Digest, title "de Furtis"; and the "Institutes," book IV. tit. 1, secs. 1, 2, and 3.

b "Of Laws," book I.

14.—*That we must not separate the Laws from the Circumstances in which they were made*

It was decreed by a law at Athens, that when the city was besieged, all the useless people should be put to death.[c] This was an abominable political law, in consequence of an abominable law of nations. Among the Greeks the inhabitants of a town taken lost their civil liberty and were sold as slaves. The taking of a town implied its entire destruction, which is the source not only of those obstinate defences, and of those unnatural actions, but likewise of those shocking laws which they sometimes enacted.

The Roman laws ordained that physicians should be punished for neglect or unskilfulness.[d] In those cases, if the physician was a person of any fortune or rank, he was only condemned to deportation, but if he was of a low condition he was put to death. By our institutions it is otherwise. The Roman laws were not made under the same circumstances as ours: at Rome every ignorant pretender intermeddled with physic; but among us physicians are obliged to go through a regular course of study, and to take their degrees, for which reason they are supposed to understand their profession.

15.—*That sometimes it is proper the Law should amend itself*

The law of the Twelve Tables allowed people to kill a night-thief as well as a day-thief,[e] if upon being pursued he attempted to make a defence; but it required that the person who killed the thief should cry out and call his fellow-citizens.[f] This is indeed what those laws, which permit people to do justice to themselves, ought always to require. It is the cry of innocence which in the very moment of the action calls in witnesses and appeals to judges. The people ought to take cognizance of the action, and at the very instant of its being done; an instant when everything speaks, even air, countenance, passions, silence; and when every word either condemns or absolves. A law, which may become so opposed to the security and liberty of the citizens, ought to be executed in their presence.

c "Inutilis ætas occidatur."—Syrian in Hermog.

d The Cornelian law "de Sicariis," "Institut." lib. IV. tit. 3, "de lege Aquilia," sec. 7.

e See the 4th law ff. "ad leg. Aquil."

f Ibid.; see the decree of Tassillon added to the law of the Bavarians, "de popularib. Legib." art. 4.

16.—*Things to be observed in the composing of Laws*

They who have a genius sufficient to enable them to give laws to their own, or to another nation, ought to be particularly attentive to the manner of forming them.

The style ought to be concise. The laws of the Twelve Tables are a model of conciseness; the very children used to learn them by heart.[g] Justinian's *Novellæ* were so very diffuse that they were obliged to abridge them.[h]

The style should also be plain and simple, a direct expression being better understood than an indirect one. There is no majesty at all in the laws of the lower empire; princes are made to speak like rhetoricians. When the style of laws is inflated, they are looked upon only as a work of parade and ostentation.

It is an essential article that the words of the laws should excite in everybody the same ideas. Cardinal Richelieu[i] agreed that a minister might be accused before the king, but he would have the accuser punished if the facts he proved were not matters of moment. This was enough to hinder people from telling any truth whatsoever against the minister, because a matter of moment is entirely relative, and what may be of moment to one is not so to another.

The law of Honorius punished with death any person that purchased a freed-man as a slave, or that gave him molestation.[j] He should not have made use of so vague an expression; the molestation given a man depends entirely on the degree of his sensibility.

When the law has to impose a penalty, it should avoid as much as possible the estimating it in money. The value of money changes from a thousand causes, and the same denomination continues without the same thing. Every one knows the story of that impudent fellow at Rome,[k] who used to give those he met a box on the ear, and afterwards tendered them the five-and-twenty pence of the law of the Twelve Tables.

When the law has once fixed the idea of things, it should never return to vague expressions. The ordinance of Louis

[g] "Ut carmen necessarium."—Cicero, "de Legib." 2. Aristotle avers that before the art of writing was discovered, the laws were composed in verse and frequently sung, to prevent them being forgotten.—Ed.

[h] It is the work of Irnerius.

[i] "Political Testament."

[j] "Aut qualibet manumissione donatum inquietare voluerit." Appendix to the Theodosian code in the first volume of Father Sirmond's works, p. 737.

[k] Aulus Gellius, book XX. chap. i.

XIV *l* concerning criminal matters, after an exact enumeration of the causes in which the king is immediately concerned, adds these words, "and those which in all times have been subject to the determination of the king's judges"; this again renders arbitrary what had just been fixed.

Charles VII says *m* he has been informed that the parties appeal three, four, and six months after judgment, contrary to the custom of the kingdom in a country where custom prevailed; he, therefore, ordains that they shall appeal forthwith, unless there happens to be some fraud or deceit on the part of the attorney,*n* or unless there be a great or evident cause to discharge the appeal. The end of this law destroys the beginning, and it destroys it so effectually, that they used afterwards to appeal during the space of thirty years.*o*

The law of the Lombards does not allow a woman that has taken a religious habit,*p* though she has made no vow, to marry; because, says this law, "if a spouse who has been contracted to a woman only by a ring cannot without guilt be married to another, for a much stronger reason the spouse of God or of the blessed Virgin."—Now, I say, that in laws the arguments should be drawn from one reality to another, and not from reality to figure, or from figure to reality.

A law enacted by Constantine *q* ordains that the single testimony of a bishop should be sufficient without listening to any other witnesses. This prince took a very short method; he judged of affairs by persons, and of persons by dignities.

The laws ought not to be subtle; they are designed for people of common understanding, not as an art of logic, but as the plain reason of a father of a family.

When there is no necessity for exceptions and limitations in a law it is much better to omit them: details of that kind throw people into new details.

No alteration should be made in a law without sufficient reason. Justinian ordained that a husband might be repudiated and yet the wife not lose her portion, if for the space of two years he had been incapable of consummating the mar-

l We find in the verbal process of this ordinance the motives that determined him.

m In his ordinance of Montel-les-tours, in the year 1453.

n They might punish the attorney, without there being any necessity of disturbing the public order.

o The ordinance of the year 1667 has made some regulations upon this head.

p Book II. tit. 37.

q In Father Sirmond's appendix to the Theodosian code, tom. i.

riage.[r] He altered his law afterwards, and allowed the poor wretch three years.[s] But in a case of that nature two years are as good as three, and three are not worth more than two.

When a legislator condescends to give the reason of his law it ought to be worthy of its majesty. A Roman law decrees that a blind man is incapable to plead, because he cannot see the ornaments of the magistracy.[t] So bad a reason must have been given on purpose, when such a number of good reasons were at hand.

Paul, the jurist, says,[u] that a child grows perfect in the seventh month, and that the ratio of Pythagoras's numbers seems to prove it. It is very extraordinary that they should judge of those things by the ratio of Pythagoras's numbers.

Some French lawyers have asserted, that when the king made an acquisition of a new country, the churches became subject to the *Regale*, because the king's crown is round. I shall not examine here into the king's rights, or whether in this case the reason of the civil or ecclesiastic law ought to submit to that of the law of politics; I shall only say, that those august rights ought to be defended by grave maxims. Was there ever such a thing known as the real rights of a dignity founded on the figure of that dignity's sign?

Davila says[v] that Charles IX was declared of age in the Parliament of Rouen at the commencement of his fourteenth year, because the laws require every moment of the time to be reckoned, in cases relating to the restitution and administration of a ward's estate; whereas it considers the year commenced as a year complete, when the case is concerning the acquisition of honors.[w] I am very far from censuring a regulation which has been hitherto attended with no inconvenience; I shall only notice that the reason alleged is not the true one;[x] it is false, that the government of a nation is only an honor.

In point of presumption, that of the law is far preferable to that of the man. The French law considers every act of a merchant during the ten days preceding his bankruptcy as fraudulent:[y] this is the presumption of the law. The Roman

r Leg. 1, code "de Repudiis."
s See the authentic "Sed hodie," in the code "de Repudiis."
t Leg. 1 ff. "de Postulando."
u In his "Sentences," book IV. tit. 9.
v "Della guerra civile di Francia," D. 96.
w See Dupuy, "Traité de la Majorité de nos rois," p. 364, edit. 1655.—Ed.
x The Chancellor de l'Hôpital.—Ibid.
y It was made in the month of November, 1702.

law inflicted punishments on the husband who kept his wife after she had been guilty of adultery, unless he was induced to do it through fear of the event of a law-suit, or through contempt of his own shame; this is the presumption of the man. The judge must have presumed the motives of the husband's conduct, and must have determined a very obscure and ambiguous point; when the law presumes it gives a fixed rule to the judge.

Plato's law,[z] as I have observed already, required that a punishment should be inflicted on the person who killed himself not with a design of avoiding shame, but through pusillanimity. This law was so far defective, that in the only case in which it was impossible to draw from the criminal an acknowledgment of the motive upon which he had acted, it required the judge to determine concerning these motives.

As useless laws debilitate such as are necessary, so those that may be easily eluded weaken the legislation. Every law ought to have its effect, and no one should be suffered to deviate from it by a particular exception.

The Falcidian law ordained among the Romans, that the heir should always have the fourth part of the inheritance; another law suffered the testator to prohibit the heir from retaining this fourth part.[a] This is making a jest of the laws. The Falcidian law became useless: for if the testator had a mind to favor his heir, the latter had no need of the Falcidian law; and if he did not intend to favor him, he forbade him to make use of it.

Care should be taken that the laws be worded in such a manner as not to be contrary to the very nature of things. In the proscription of the Prince of Orange, Philip II promises to any man that will kill the prince to give him, or his heirs, five-and-twenty thousand crowns, together with the title of nobility; and this upon the word of a king and as a servant of God. To promise nobility for such an action! to ordain such an action in the quality of a servant of God! This is equally subversive of the ideas of honor, morality, and religion.

There very seldom happens to be a necessity of prohibiting a thing which it not bad under pretence of some imaginary perfection.

z Book IX. "of Laws." *a* It is the authentic "Sed cum testator."

There ought to be a certain simplicity and candor in the laws; made to punish the iniquity of men they themselves should be clad with the robes of innocence. We find in the law of the Visigoths [b] that ridiculous request, by which the Jews were obliged to eat everything dressed with pork, provided they did not eat the pork itself. This was a very great cruelty: they were obliged to submit to a law contrary to their own; and they were obliged to retain nothing more of their own than what might serve as a mark to distinguish them.

17.—*A bad Method of giving Laws*

The Roman emperors manifested their will like our princes, by decrees and edicts; but they permitted, which our princes do not, both the judges and private people to interrogate them by letters in their several differences; and their answers were called rescripts. The decretals of the popes are rescripts, strictly speaking. It is plain that this is a bad method of legislation. Those who thus apply for laws are improper guides to the legislator; the facts are always wrongly stated. Julius Capitolinus says,[c] that Trajan often refused to give this kind of rescripts, lest a single decision, and frequently a particular favor, should be extended to all cases. Macrinus had resolved to abolish all those rescripts;[d] he could not bear that the answers of Commodus, Caracalla, and all those other ignorant princes, should be considered as laws. Justinian thought otherwise, and he filled his compilation with them.

I would advise those who read the Roman laws, to distinguish carefully between this sort of hypothesis, and the Senatus-Consulta, the Plebiscita, the general constitutions of the emperors, and all the laws founded on the nature of things, on the frailty of women, the weakness of minors and the public utility.

18.—*Of the Ideas of Uniformity*

There are certain ideas of uniformity, which sometimes strike great geniuses (for they even affected Charlemagne), but infallibly make an impression on little souls. They discover therein a kind of perfection, which they recognize be-

[b] Book XII. tit. 2, sec. 16.

[c] See Julius Capitolinus "in Macrino."

[d] Ibid.

cause it is impossible for them not to see it; the same authorized weights, the same measures in trade, the same laws in the state, the same religion in all its parts. But is this always right and without exception? Is the evil of changing constantly less than that of suffering? And does not a greatness of genius consist rather in distinguishing between those cases in which uniformity is requisite, and those in which there is a necessity for differences? In China the Chinese are governed by the Chinese ceremonial and the Tartars by theirs; and yet there is no nation in the world that aims so much at tranquillity. If the people observe the laws, what signifies it whether these laws are the same?

19.—*Of Legislators*

Aristotle wanted to indulge sometimes his jealousy against Plato, and sometimes his passion for Alexander. Plato was incensed against the tyranny of the people of Athens. Machiavel was full of his idol, the Duke of Valentinois. Sir Thomas More, who spoke rather of what he had read than of what he thought, wanted to govern all states with the simplicity of a Greek city.* Harrington was full of the idea of his favorite republic of England, while a crowd of writers saw nothing but confusion where monarchy is abolished. The laws always conform to the passions and prejudices of the legislator; sometimes the latter pass through, and only tincture them; sometimes they remain, and are incorporated with them.

* In his "Utopia."

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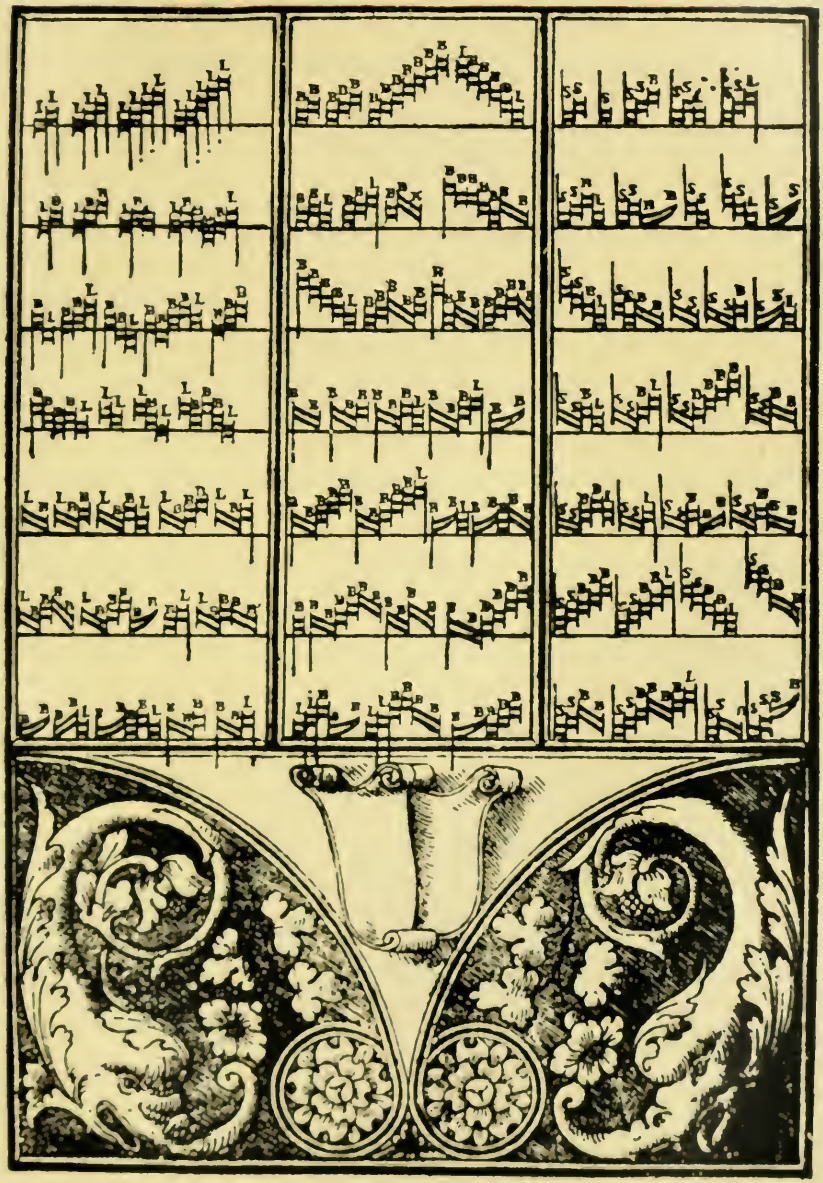

BOOK XXX

THEORY OF THE FEUDAL LAWS AMONG THE FRANKS IN THE RELATION THEY BEAR TO THE ESTABLISHMENT OF THE MONARCHY

1.—*Of Feudal Laws*

I SHOULD think my work imperfect were I to pass over in silence an event which never again, perhaps, will happen; were I not to speak of those laws which suddenly appeared over all Europe without being connected with any of the former institutions; of those laws which have done infinite good and infinite mischief; which have suffered rights to remain when the demesne has been ceded; which by vesting several with different kinds of seigniory over the same things or persons have diminished the weight of the whole seigniory; which have established different limits in empires of too great extent; which have been productive of rule with a bias to anarchy, and of anarchy with a tendency to order and harmony.

This would require a particular work to itself; but considering the nature of the present undertaking, the reader will here meet rather with a general survey than with a complete treatise of those laws.

The feudal laws form a very beautiful prospect. A venerable old oak raises its lofty head to the skies, the eye sees from afar its spreading leaves; upon drawing nearer, it perceives the trunk but does not discern the root; the ground must be dug up to discover it.[a]

2.—*Of the Source of Feudal Laws*

The conquerors of the Roman Empire came from Germany. Though few ancient authors have described their manners, yet

[a] "Quantum vertice ad oras
Æthereas, tantum radice ad Tartara tendit."—Vergil.

we have two of very great weight. Cæsar making war against the Germans describes the manners of that nation;[b] and upon these he regulated some of his enterprises.[c] A few pages of Cæsar upon this subject are equal to whole volumes.[d]

Tacitus has written an entire work on the manners of the Germans. This work is short, but it comes from the pen of Tacitus, who was always concise, because he saw everything at one glance.

These two authors agree so perfectly with the codes still extant of the laws of the barbarians, that reading Cæsar and Tacitus we imagine we are perusing these codes, and perusing these codes we fancy we are reading Cæsar and Tacitus.

But if in this research into the feudal laws, I should find myself entangled and lost in a dark labyrinth I fancy I have the clue in my hand, and that I shall be able to find my way through.

3.—*The Origin of Vassalage*

Cæsar says,[e] that "The Germans neglected agriculture; that the greatest part of them lived upon milk, cheese, and flesh; that no one had lands or boundaries of his own; that the princes and magistrates of each nation allotted what portion of land they pleased to individuals, and obliged them the year following to remove to some other part." Tacitus says,[f] that "Each prince had a multitude of men, who were attached to his service, and followed him wherever he went." This author gives them a name in his language in accordance with their state, which is that of companions.[g] They had a strong emulation to obtain the prince's esteem; and the princes had the same emulation to distinguish themselves in the bravery and number of their companions. "Their dignity and power," continues Tacitus, "consist in being constantly surrounded with a multitude of young and chosen people; this they reckon their ornament in peace, this their defence and support in war. Their name becomes famous at home, and among neighboring

b Book VI.

c For instance, his retreat from Germany.—Ibid.

d M. Chabrit expresses his astonishment that Montesquieu dwells upon Cæsar's knowledge of the Germans, and quite ignores the Gauls, with their fund of information upon this subject. —Ed.

e Book VI. "of the Gallic Wars." Tacitus adds, "Nulli domus aut ager, aut aliqua cura; prout ad quem venere aluntur." — "De Moribus Germanorum."

f "De Moribus Germanorum."

g "Comites."

nations, when they excel all others in the number and courage of their companions: they receive presents and embassies from all parts. Reputation frequently decides the fate of war. In battle it is infamy in the prince to be surpassed in courage; it is infamy in the companions not to follow the brave example of their prince; it is an eternal disgrace to survive him. To defend him is their most sacred engagement. If a city be at peace, the princes go to those who are at war; and it is thus they retain a great number of friends. To these they give the war horse and the terrible javelin. Their pay consists in coarse but plentiful repasts. The prince supports his liberality merely by war and plunder. You might more easily persuade them to attack an enemy and to expose themselves to the dangers of war, than to cultivate the land, or to attend to the cares of husbandry; they refuse to acquire by sweat what they can purchase with blood."

Thus, among the Germans, there were vassals, but no fiefs; they had no fiefs, because the princes had no lands to give; or rather their fiefs consisted in horses trained for war, in arms, and feasting. There were vassals, because there were trusty men who being bound by their word engaged to follow the prince to the field, and did very nearly the same service as was afterwards performed for the fiefs.

4.—*The same Subject continued*

Cæsar says,[h] that "when any of the princes declared to the assembly that he intended to set out upon an expedition and ask them to follow him, those who approved the leader and the enterprise stood up and offered their assistance. Upon which they were commended by the multitude. But, if they did not fulfil their engagements, they lost the public esteem, and were looked upon as deserters and traitors."

What Cæsar says in this place, and what we have extracted in the preceding chapter from Tacitus, are the substance of the history of our princes of the first race.

We must not, therefore, be surprised, that our kings should have new armies to raise upon every expedition, new troops to encourage, new people to engage; that to acquire much they were obliged to incur great expenses; that they should be con-

[h] "De Bello Gallico," lib. VI.

stant gainers by the division of lands and spoils, and yet give these lands and spoils incessantly away: that their demesne should continually increase and diminish; that a father upon settling a kingdom on one of his children *i* should always give him a treasure with it: that the king's treasure should be considered as necessary to the monarchy; and that one king could not give part of it to foreigners, even in portion with his daughter, without the consent of the other kings.*j* The monarchy moved by springs, which they were continually obliged to wind up.

5.—*Of the Conquests of the Franks*

It is not true that the Franks upon entering Gaul took possession of the whole country to turn it into fiefs. Some have been of this opinion because they saw the greatest part of the country towards the end of the second race converted into fiefs, rear-fiefs, or other dependencies; but such a disposition was owing to particular causes which we shall explain hereafter.

The consequence which sundry writers would infer thence, that the barbarians made a general regulation for establishing in all parts the state of villanage is as false as the principle from which it is derived. If at a time when the fiefs were precarious, all the lands of the kingdom had been fiefs, or dependencies of fiefs; and all the men in the kingdom vassals or bondmen subordinate to vassals; as the person that has property is ever possessed of power, the king, who would have continually disposed of the fiefs, that is, of the only property then existing, would have had a power as arbitrary as that of the Sultan is in Turkey; which is contradictory to all history.

6.—*Of the Goths, Burgundians, and Franks*

Gaul was invaded by German nations. The Visigoths took possession of the province of Narbonne, and of almost all the South; the Burgundians settled in the East; and the Franks subdued very nearly all the rest.

i See the "Life of Dagobert."

j See Gregory of Tours, book VI., on the marriage of the daughter of Chilperic. Childebert sends ambassadors to tell him that he should not give the cities of his father's kingdom to his daughter, nor his treasures, nor his bondmen, nor horses, nor horsemen, nor teams of oxen, etc.

No doubt but these barbarians retained in their respective conquests the manners, inclinations, and usages of their own country; for no nation can change in an instant their manner of thinking and acting. These people in Germany neglected agriculture. It seems by Cæsar and Tacitus that they applied themselves greatly to a pastoral life; hence the regulations of the codes of barbarian laws almost all relate to their flocks. Roricon, who wrote a history among the Franks, was a shepherd.[k]

7.—*Different Ways of dividing the Land*

After the Goths and Burgundians had, under various pretences, penetrated into the heart of the empire, the Romans, in order to put a stop to their devastations, were obliged to provide for their subsistence. At first they allowed them corn;[l] but afterwards chose to give them lands. The emperors, or the Roman magistrates, in their name, made particular conventions with them concerning the division of lands,[m] as we find in the chronicles and in the codes of the Visigoths[n] and Burgundians.[o]

The Franks did not follow the same plan. In the Salic and Ripuarian laws, we find not the least vestige of any such division of lands; they had conquered the country, and so took what they pleased, making no regulations but among themselves.

Let us, therefore, distinguish between the conduct of the Burgundians and Visigoths in Gaul, of those same Visigoths in Spain, of the auxiliary troops under Augustulus and Odoacer in Italy,[p] and that of the Franks in Gaul, as also of the Vandals in Africa.[q] The former entered into conventions with the ancient inhabitants, and in consequence thereof made a division of lands between them; the latter did no such thing.

k Nothing definite is known concerning this Roricon; and his works are rather reveries and fables than anything else. See the article in "Mercure" for October, 1741.—Ed.

l The Romans obliged themselves to this by treaties. See Zosimus V upon the distribution of corn demanded by Alaric.—Ed.

m "Burgundiones partem Galliæ occuparunt, terrasque cum Gallicis senatoribus diviserunt."—Marius's "Chronicle" in the year 456.

n Book X. tit. 1, secs. 8, 9, and 16.

o Chap. liv. secs. 1 and 2. This division was still subsisting in the time of Louis the Debonnaire, as appears by his capitulary of the year 829, which has been inserted in the law of the Burgundians, tit. 79, sec. 1.

p See Procopius, "War of the Goths."

q Ibid., "War of the Vandals."

8.—*The same Subject continued*

What has induced some to think that the Roman lands were entirely usurped by the barbarians is, their finding in the laws of the Visigoths and the Burgundians that these two nations had two-thirds of the lands; but this they took only in certain quarters or districts assigned them.

Gundebald says, in the law of the Burgundians, that his people at their establishment had two-thirds of the lands allowed them;[r] and the second supplement to this law notices that only a moiety would be allowed to those who should hereafter come to live in that country.[s] Therefore, all the lands had not been divided in the beginning between the Romans and the Burgundians.

In those two regulations we meet with the same expressions in the text, consequently they explain one another; and as the latter cannot mean a universal division of lands, neither can this signification be given to the former.

The Franks acted with the same moderation as the Burgundians; they did not strip the Romans wherever they extended their conquests. What would they have done with so much land? They took what suited them, and left the remainder.

9.—*A just Application of the Law of the Burgundians, and of that of the Visigoths, in relation to the Division of Lands*

It is to be considered that those divisions of land were not made with a tyrannical spirit; but with a view of relieving the reciprocal wants of two nations that were to inhabit the same country.

The law of the Burgundians ordains that a Burgundian shall be received in an hospitable manner by a Roman. This is agreeable to the manners of the Germans, who, according to Tacitus, were the most hospitable people in the world.

By the law of the Burgundians, it is ordained that the Burgundians shall have two-thirds of the lands, and one-third of the bondmen. In this it considered the genius of two nations, and conformed to the manner in which they procured their sub-

r "Licet eo tempore quo populus noster mancipiorum tertiam et duas terrarum partes accepit," etc.—Law of the Burgundians, tit. 54, sec. 1.

s "Ut non amplius a Burgundionibus qui infra venerunt requiratur quam ad præsens necessitas fuerit, medietas terræ."—Art. 11.

sistence. As the Burgundians kept herds and flocks, they wanted a great deal of land and few bondmen, and the Romans from their application to agriculture had need of less land and of a greater number of bondmen. The woods were equally divided, because their wants in this respect were the same.*

We find in the code of the Burgundians,[t] that each barbarian was placed near a Roman. The division, therefore, was not general; but the Romans who gave the division were equal in number to the Burgundians who received it. The Roman was injured least. The Burgundians as a martial people, fond of hunting and of a pastoral life, did not refuse to accept of the fallow grounds; while the Romans kept such lands as were properest for culture: the Burgundian's flock fattened the Roman's field.

10.—*Of Servitudes*

The law of the Burgundians notices[u] that when those people settled in Gaul, they were allowed two-thirds of the land, and one-third of the bondmen. The state of villanage was, therefore, established in that part of Gaul before it was invaded by the Burgundians.[v]

The law of the Burgundians, in points relating to the two nations, makes a formal distinction in both, between the nobles, the free-born and the bondmen.[w] Servitude was not, therefore, a thing peculiar to the Romans; nor liberty and nobility to the barbarians.

This very same law says,[x] that if a Burgundian freed-man had not given a certain sum to his master, nor received a third share of a Roman, he was always supposed to belong to his master's family. The Roman proprietor was therefore free, since he did not belong to another person's family; he was free, because his third portion was a mark of liberty.

We need only open the Salic and Ripuarian laws to be satisfied, that the Romans were no more in a state of servitude among the Franks than among the other conquerors of Gaul.

The Count de Boulainvilliers[a] is mistaken in the capital

* "De Moribus Germanorum."

t And in that of the Visigoths.

u Tit. 54.

v This is confirmed by the whole title of the code "de Agricolis et Censitis et Colonis."

w "Si dentem optimati Burgundioni vel Romano nobili excusserit." Tit. 26. sec. 1. "et si mediocribus personis ingenuis tam Burgundionibus quam Romanis."—Ibid. sec. 2.

x Tit. 57.

a See "Mercure," March, 1784.—Ed.

point of his system: he has not proved that the Franks made a general regulation which reduced the Romans into a kind of servitude.

As this author's work is penned without art, and as he speaks with the simplicity, frankness, and candor of that ancient nobility whence he descends, every one is capable of judging of the good things he says, and of the errors into which he has fallen. I shall not, therefore, undertake to criticise him; I shall only observe, that he had more wit than enlightenment, more enlightenment than learning; though his learning was not contemptible, for he was well acquainted with the most valuable part of our history and laws.

The Count de Boulainvilliers and the Abbé du Bos[b] have formed two different systems, one of which seems to be a conspiracy against the commons, and the other against the nobility. When the sun gave leave to Phaëton to drive his chariot, he said to him, "If you ascend too high, you will burn the heavenly mansions; if you descend too low, you will reduce the earth to ashes; do not drive to the right, you will meet there with the constellation of the Serpent; avoid going too much to the left, you will there fall in with that of the Altar: keep in the middle."[c]

II.—*The same Subject continued*

What first gave rise to the notion of a general regulation made at the time of the conquest was our meeting with an immense number of forms of servitude in France, towards the beginning of the third race; and as the continual progression of these forms of servitude was not perceived, people imagined in an age of obscurity a general law which was never framed.

Towards the commencement of the first race we meet with an infinite number of freemen, both among the Franks and the Romans; but the number of bondmen increased to that degree, that at the beginning of the third race, all the husbandmen and almost all the inhabitants of towns had become bond-

b See M. Thierry in the Introduction to the "Récits Mérovingiens."—Ed.

c "Nec preme, nec summum molire per æthera currum;
Altius egressus, cœlestia tecta cremabis;
Inferius, terras: medio tutissimus ibis.
Neu te dexterior tortum declinet ad Anguem;
Neve sinisterior pressam rota ducat ad Aram;
Inter utrumque tene."—Ovid, "Metam." lib. II.

men:[d] and whereas, at the first period, there was very nearly the same administration in the cities as among the Romans, namely, a corporation, a senate, and courts of judicature; at the other we hardly meet with anything but a lord and his bondmen.

When the Franks, Burgundians, and Goths made their several invasions, they seized upon gold, silver, movables, clothes, men, women, boys, and whatever the army could carry; the whole was brought to one place, and divided among the army.[e] History shows, that after the first settlement, that is, after the first devastation, they entered into an agreement with the inhabitants, and left them all their political and civil rights. This was the law of nations in those days; they plundered everything in time of war, and granted everything in time of peace. Were it not so, how should we find both in the Salic and Burgundian laws such a number of regulations absolutely contrary to a general servitude of the people?

But though the conquest was not immediately productive of servitude, it arose nevertheless from the same law of nations which subsisted after the conquest.[f] Opposition, revolts, and the taking of towns were followed by the slavery of the inhabitants. And, not to mention the wars which the conquering nations made against one another, as there was this peculiarity among the Franks, that the different partitions of the monarchy gave rise continually to civil wars between brothers or nephews, in which this law of nations was constantly practised, servitudes, of course, became more general in France than in other countries: and this is, I believe, one of the causes of the difference between our French laws and those of Italy and Spain, in respect to the right of seigniories.

The conquest was soon over, and the law of nations then in force was productive of some servile dependences. The custom of the same law of nations, which obtained for many ages, gave a prodigious extent to those servitudes.

Theodoric[g] imagining that the people of Auvergne were not faithful to him, thus addressed the Franks of his division:

d While Gaul was under the dominion of the Romans they formed particular bodies; these were generally freed men, or the descendants of freed men.

e See Gregory of Tours, book II. chap. xxvii. Aimoin, book I. chap. xii.

f See the "Lives of the Saints."

g See Gregory of Tours, book III., for Montesquieu's deviation from the actual sense of the writer.—Ed.

"Follow me, and I will carry you into a country where you shall have gold, silver, captives, clothes, and flocks in abundance; and you shall remove all the people into your own country."

After the conclusion of the peace between Gontram and Chilperic the troops employed in the siege of Bourges, having had orders to return, carried such a considerable booty away with them, that they hardly left either men or cattle in the country.*h*

Theodoric, King of Italy, whose spirit and policy it was ever to distinguish himself from the other barbarian kings, upon sending an army into Gaul, wrote thus to the general: *i* "It is my will that the Roman laws be followed, and that you restore the fugitive slaves to their right owners. The defender of liberty ought not to encourage servants to desert their masters. Let other kings delight in the plunder and devastation of the towns which they have subdued; we are desirous to conquer in such a manner, that our subjects shall lament their having fallen too late under our government." It is evident that his intention was to cast odium on the kings of the Franks and the Burgundians, and that he alluded in the above passage to their particular law of nations.

Yet this law of nations continued in force under the second race. King Pepin's army, having penetrated into Aquitaine, returned to France loaded with an immense booty, and with a number of bondmen, as we are informed by the Annals of Metz.*j*

Here might I quote numberless authorities;*k* and as the public compassion was raised at the sight of those miseries, as several holy prelates, beholding the captives in chains, employed the treasure belonging to the church, and sold even the sacred utensils, to ransom as many as they could; and as several holy monks exerted themselves on that occasion, it is in the "Lives of the Saints" that we meet with the best explanations on the subject.*l* And, although it may be objected to the

h See Gregory of Tours, book VI. chap. 31.

i Letter 43, lib. iii. "in Cassiod."

j In the year 763. "Innumerabilibus spoliis et captivis totus ille exercitus ditatus, in Franciam reversus est."

k See the "Annals" of Fuld, in the year 739; Paulus Diaconus, "de Gestis Longobardorum," lib. III. cap. xxx., and lib. IV. cap. i., and the "Lives of the Saints" in the next quotation.

l See the lives of St. Epiphanius, St. Eptadius, St. Cæsarius, St. Fidolus, St. Porcian, St. Treverius, St. Eusichius; and of St. Leger, the miracles of St. Julian, etc.

authors of those lives that they have been sometimes a little too credulous in respect to things which God has certainly performed, if they were in the order of his providence; yet we draw considerable light thence with regard to the manners and usages of those times.

When we cast an eye upon the monuments of our history and laws, the whole seems to be an immense expanse, a boundless ocean;[m] all those frigid, dry, insipid, and hard writings must be read and devoured in the same manner as Saturn is fabled to have devoured the stones.

A vast quantity of land which had been in the hands of freemen[n] was changed into mortmain. When the country was stripped of its free inhabitants; those who had a great multitude of bondmen either took large territories by force, or had them yielded by agreement, and built villages, as may be seen in different charters. On the other hand, the freemen who cultivated the arts found themselves reduced to exercise those arts in a state of servitude; thus the servitudes restored to the arts and to agriculture whatever they had lost.

It was a customary thing with the proprietors of lands, to give them to the churches, in order to hold them themselves by a quit-rent, thinking to partake by their servitude of the sanctity of the churches.

12.—*That the Lands belonging to the Division of the Barbarians paid no Taxes*

A people remarkable for their simplicity and poverty, a free and martial people, who lived without any other industry than that of tending their flocks, and who had nothing but rush cottages to attach them to their lands,[o] such a people, I say, must have followed their chiefs for the sake of booty, and not to pay or to raise taxes. The art of tax-gathering was invented later, and when men began to enjoy the blessings of other arts.

The temporary tax of a pitcher of wine for every acre,[p] which was one of the exactions of Chilperic and Fredegonda, related only to the Romans. And, indeed, it was not the Franks that tore the rolls of those taxes, but the clergy, who in those days

[m] "Decrant quoque littora ponto."—Ovid, lib. I.

[n] Even the husbandmen themselves were not all slaves: see the 18th and 23d law in the code "de Agricolis et Censitis et Colonis," and the 20th of the same title.

[o] See Gregory of Tours, book II.

[p] Ibid. book V.

were all Romans.[q] The burden of this tax lay chiefly on the inhabitants of the towns; [r] now these were almost all inhabited by Romans.

Gregory of Tours relates,[s] that a certain judge was obliged, after the death of Chilperic, to take refuge in a church, for having under the reign of that prince ordered taxes to be levied on several Franks who in the reign of Childebert were *ingenui,* or free-born: "*Multos de Francis, qui tempore Childeberti regis ingenui fuerant, publico tributo subegit.*" Therefore the Franks who were not bondmen paid no taxes.

There is not a grammarian but would turn pale to see how the Abbé du Bos has interpreted this passage.[t] He observes, that in those days the freedmen were also called *ingenui.* Upon this supposition he renders the Latin word *ingenui,* by the words "freed from taxes"; a phrase which we indeed may use in French, as we say "freed from cares," "freed from punishments"; but in the Latin tongue such expressions as *ingenui a tributis libertini a tributis, manumissi tributorum,* would be quite monstrous.[u]

Parthenius, says Gregory of Tours,[v] had like to have been put to death by the Franks for subjecting them to taxes. The Abbé du Bos finding himself hard pressed by this passage [w] very coolly assumes the thing in question; it was, says he, a surcharge.

We find in the law of the Visigoths,[x] that when a barbarian had seized upon the estate of a Roman, the judge obliged him to sell it, to the end that this estate might continue to be tributary; consequently the barbarians paid no land taxes.[y]

The Abbé du Bos,[z] who would fain have the Visigoths subjected to taxes,[a] quits the literal and spiritual sense of the law, and pretends, upon no other indeed than an imaginary founda-

q See Gregory of Tours, book VIII.

r "Quæ conditio universis urbibus per Galliam constitutis summopere est adhibita."—"Life of St. Aridius."

s Book VII.

t "Establishment of the French Monarchy," tom. iii. chap. xiv. p. 515.

u See Baluzius, ii. p. 187.

v Book III. chap. cxxxvi.

w Tom. iii. p. 514.

x "Judices atque præpositi terras Romanorum, ab illis qui occupatas tenent, auferant, et Romanis suâ exactione sine aliquâ dilatione restituant, ut nihil fisco debeat deperire."—Lib. X. tit. I, cap. xiv.

y The Vandals paid none in Africa.—Procopius, "War of the Vandals," lib. I. and II. "Historia Miscella." lib. XVI. p. 106. Observe that the conquerors of Africa were a mixture of Vandals, Alans, and Franks. "Historia Miscella." lib. XIV. p. 94.

z "Establishment of the Franks in Gaul," tom. iii. chap. xiv. p. 510.

a He lays a stress upon another law of the Visigoths, book X. tit. I, art. II, which proves nothing at all; it says only that he who has received of a lord a piece of land on condition of a rent or service ought to pay it.

tion, that between the establishment of the Goths and this law, there had been an augmentation of taxes which related only to the Romans. But none but Father Harduin are allowed thus to exercise an arbitrary power over facts.

This learned author[b] has rummaged Justinian's code,[c] in search of laws to prove, that among the Romans, the military benefices were subject to taxes. Whence he would infer that the same held good with regard to fiefs or benefices among the Franks. But the opinion that our fiefs derive their origin from that Institution of the Romans is at present exploded; it obtained only at a time when the Roman history, not ours, was well understood, and our ancient records lay buried in obscurity and dust.

But the abbé is in the wrong to quote Cassiodorus, and to make use of what was transacting in Italy, and in the part of Gaul subject to Theodoric, in order to acquaint us with the practice established among the Franks; these are things which must not be confounded. I propose to show, some time or other, in a certain work, that the plan of the monarchy of the Ostrogoths was entirely different from that of any other government founded in those days by the other barbarian nations; and that so far from our being entitled to affirm that a practice obtained among the Franks because it was established among the Ostrogoths we have on the contrary just reason to think that a custom of the Ostrogoths was not in force among the Franks.

The hardest task for persons of extensive erudition is, to seek their proofs in such passages as bear upon the subject, and to find, if we may be allowed to express ourselves in astronomical terms, the position of the sun.

The same author makes a wrong use of the capitularies, as well as of the historians and laws of the barbarous nations. When he wants the Franks to pay taxes, he applies to freemen what can be understood only of bondmen;[d] when he speaks of their military service, he applies to bondmen what can never relate but to freemen.[e]

[b] Book III. p. 511.
[c] Leg. iii. tit. 74. lib. XI.
[d] "Establishment of the French Monarchy," tom. iii. chap. xiv. p. 513, where he quotes the 28th article of the Edict of Pistes. See farther on.
[e] Ibid. tom. iii. chap. iv. p. 298.

13.—*Of Taxes paid by the Romans and Gauls in the Monarchy of the Franks*

I might here examine whether, after the Gauls and Romans were conquered, they continued to pay the taxes to which they were subject under the emperors. But, for the sake of brevity, I shall be satisfied with observing, that if they paid them in the beginning, they were soon after exempted, and that those taxes were changed into a military service. For, I confess, I can hardly conceive how the Franks should have been at first such great friends, and afterwards such sudden and violent enemies, to taxes.

A Capitulary *f* of Louis the Debonnaire explains extremely well the situation of the freemen in the monarchy of the Franks. Some troops of Goths or Iberians,*g* flying from the oppression of the Moors, were received into Louis's dominions. The agreement made with them was that, like other freemen, they should follow their count to the army; and, that upon a march they should mount guard and patrol under the command also of their count; *h* and that they should furnish horses and carriages for baggage to the king's commissaries,*i* and to the ambassadors in their way to or from court; and that they should not be compelled to pay any further impost, but should be treated as the other freemen.

It cannot be said, that these were new usages introduced at the commencement of the second race. This must be referred at least to the middle or to the end of the first. A capitulary of the year 864 *j* says in express terms that it was the ancient custom for freemen to perform military service, and to furnish likewise the horses and carriages above mentioned; duties particular to themselves, and from which those who possessed the fiefs were exempt, as I shall prove hereafter.

This is not all; there was a regulation which hardly permitted the imposing of taxes on those freemen.*k* He who had

f In the year 815, chap. i., which is agreeable to the Capitulary of Charles the Bald, in the year 844, arts. 1 and 2.

g "Pro Hispanis in partibus Aquitaniæ, Septimaniæ, et Provinciæ consistentibus."—Ibid.

h "Excubias et exploraciones quas Wactas dicunt."—Ibid.

i They were not obliged to furnish any to the count.—Ibid. art. 5. See Marc. form. VI. lib. I.

j "Ut pagenses Franci, qui caballos habent, cum suis comitibus in hostem pergant." The counts are forbidden to deprive them of their horses, "ut hostem facere, et debitos paraveredos secundum antequam consuetudinem exsolvere possint."—Edict of Pistes in Baluzius, p. 186.

k Capitulary of Charlemagne, in the year 812, chap. i. Edict of Pistes in the year 864, art. 27.

four manors was always obliged to march against the enemy: *l* he who had but three was joined with a freeman that had only one; the latter bore the fourth part of the other's charges, and stayed at home. In like manner, they joined two freemen who had each two manors; he who went to the army had half his charges borne by him who stayed at home.

Again, we have an infinite number of charters, in which the privileges of fiefs are granted to lands or districts possessed by freemen, and of which I shall make further mention hereafter.*m* These lands are exempted from all the duties or services which were required of them by the counts, and by the rest of the king's officers; and as all these services are particularly enumerated without making any mention of taxes, it is manifest that no taxes were imposed upon them.

It was very natural that the Roman system of taxation should of itself fall out of use in the monarchy of the Franks; it was a most complicated device, far above the conception, and wide from the plan of those simple people. Were the Tartars to overrun Europe, we should find it very difficult to make them comprehend what is meant by our financiers.

The anonymous author of the "Life of Louis the Debonnaire," *n* speaking of the counts and other officers of the nation of the Franks, whom Charlemagne established in Aquitania, says, that he intrusted them with the care of defending the frontiers, as also with the military power and the direction of the demesnes belonging to the crown. This shows the state of the royal revenues under the second race. The prince had kept his demesnes in his own hands, and employed his bondmen in improving them. But the indictions, the capitations, and other imposts raised at the time of the emperors on the persons or goods of freemen had been changed into an obligation of defending the frontiers, and marching against the enemy.

In the same history,*o* we find that Louis the Debonnaire, having been to wait upon his father in Germany, this prince asked him, why he, who was a crowned head, came to be so poor; To which Louis made answer, that he was only a nom-

l "Quatuor mansos." I fancy that what they called "mansus" was a particular portion of land belonging to a farm where there were bondmen; witness the Capitulary of the year 853, "apud Sylvacum," tit. xiv., against those who drove the bondmen from their mansus.

m See below, chap. 20 of this book.

n In Duchesne, tom. ii. p. 287.

o Ibid., p. 89.

inal king, and that the great lords were possessed of almost all his demesnes; that Charlemagne being apprehensive lest this young prince should forfeit their affection, if he attempted himself to resume what he had inconsiderately granted, appointed commissaries to restore things to their former situation.

The bishops, writing *p* to Louis, brother of Charles the Bald, used these words: "Take care of your lands, that you may not be obliged to travel continually by the houses of the clergy, and to tire their bondmen with carriages. Manage your affairs," continue they, "in such a manner, that you may have enough to live upon, and to receive embassies." It is evident that the king's revenues in those days consisted of their demesnes.*q*

14.—*Of what they called Census*

After the barbarians had quitted their own country, they were desirous of reducing their usages into writing; but as they found difficulty in writing German words with Roman letters, they published these laws in Latin.

In the confusion and rapidity of the conquest, most things changed their nature; in order, however, to express them, they were obliged to make use of such old Latin words as were most analogous to the new usages. Thus, whatever was likely to revive the idea of the ancient census of the Romans they called by the name of *census tributum;* *r* and when things had no relation at all to the Roman census, they expressed, as well as they could, the German words by Roman letters; thus they formed the word *fredum*, on which I shall have occasion to descant in the following chapters.

The words *census* and *tributum* having been employed in an arbitrary manner this has thrown some obscurity on the signification in which these words were used under our princes of the first and second race. And modern authors *s* who have

p See the Capitulary of the year 858, art. 14.

q They levied also some duties on rivers, where there happened to be a bridge or a passage.

r The census was so generical a word, that they made use of it to express the tolls of rivers, when there was a bridge or ferry to pass. See the third Capitulary, in the year 803, edition of Baluzius, p. 395, art. 1; and the 5th in the year 819, p. 616. They gave likewise this name to the carriages furnished by the freemen to the king, or to his commissaries, as appears by the Capitulary of Charles the Bald in the year 865, art. 8.

s The Abbé du Bos, and his followers.

adopted particular systems, having found these words in the writings of those days, imagined that what was then called census, was exactly the census of the Romans; and thence they inferred this consequence, that our kings of the first two races had put themselves in the place of the Roman emperors, and made no change in their administration.[t] Besides, as particular duties raised under the second race were by change and by certain restrictions converted into others,[u] they inferred thence that these duties were the census of the Romans; and as, since the modern regulations, they found that the crown demesnes were absolutely unalienable, they pretended that those duties which represented the Roman census, and did not form a part of the demesnes, were mere usurpation. I omit the other consequences.

To apply the idea of the present time to distant ages is the most fruitful source of error. To those people who want to modernize all the ancient ages, I shall say what the Egyptian priests said to Solon, "O Athenians, you are mere children!"[v]

15.—*That what they called Census was raised only on the Bondmen and not on the Freemen*

The king, the clergy, and the lords raised regular taxes, each on the bondmen of their respective demesnes. I prove it with respect to the king, by the Capitulary *de Villis*; with regard to the clergy, by the codes of the laws of the barbarians[w] and in relation to the lords, by the regulations which Charlemagne made concerning this subject.[x]

These taxes were called *census;* they were economical and not fiscal claims, entirely private dues and not public taxes.

I affirm, that what they called *census* at that time was a tax raised upon the bondmen. This I prove by a formulary of Marculfus containing a permission from the king to enter into holy orders, provided the persons be free-born,[y] and not enrolled in the register of the *census*. I prove it also by a commis-

[t] See the weakness of the arguments produced by the Abbé du Bos, in the "Establishment of the French Monarchy," tom. iii. book VI. chap. xiv.; especially in the inference he draws from a passage of Gregory of Tours, concerning a dispute between his church and King Charibert.

[u] For instance, by enfranchisements.

[v] "Apud Platonem, in Timæo, vel de natura."—Ed.

[w] Law of the Alemans, chap. xxii.; and the law of the Bavarians, tit. i. chap. xiv., where the regulations are to be found which the clergy made concerning their order.

[x] Book 5th of the Capitularies, chap. ccciii.

[y] "Si ille de capite suo bene ingenuus sit, et in Puletico publico censitus non est."—Lib. I. formul. 19.

sion from Charlemagne to a count *z* whom he had sent into Saxony, which contains the enfranchisement of the Saxons for having embraced Christianity, and is properly a charter of freedom.*a* This prince restores them to their former civil liberty,*b* and exempts them from paying the census. It was, therefore, the same thing to be a bondman as to pay the census, to be free as not to pay it.

By a kind of letters-patent of the same prince in favor of the Spaniards,*c* who had been received into the monarchy, the counts are forbidden to demand any census of them, or to deprive them of their lands. That strangers upon their coming to France were treated as bondmen is a thing well known; and Charlemagne being desirous they should be considered as freemen, since he would have them be proprietors of their lands, forbade the demanding any census of them.

A Capitulary of Charles the Bald,*d* given in favor of those very Spaniards, orders them to be treated like the other Franks, and forbids the requiring any census of them; consequently this census was not paid by freemen.

The thirtieth article of the Edict of Pistes reforms the abuse by which several of the husbandmen belonging to the king or to the church sold the lands dependent on their manors to ecclesiastics or to people of their condition, reserving only a small cottage to themselves; by which means they avoided paying the census; and it ordains that things should be restored to their primitive situation: the census was, therefore, a tax peculiar to bondmen.

Thence also it follows, that there was no general census in the monarchy; and this is clear from a great number of passages. For what could be the meaning of this capitulary,*e* "We ordain that the royal census should be levied in all places, where formerly it was lawfully levied"? *f* What could be the meaning of that in which Charlemagne *g* orders his commis-

z In the year 789, edition of the Capitularies by Baluzius, vol. i. p. 250.

a "Et ut ista ingenuitatis pagina firma stabilisque consistat."—Ibid.

b "Pristinæque libertati donatos, et omni nobis debito censu solutos."—Ibid.

c "Præceptum pro Hispanis," in the year 812, edition of Baluzius, tom. i. p. 500.

d In the year 844, edition of Baluzius, tom. ii. arts. 1 and 2, p. 27.

e Third Capitulary of the year 805, arts. 20 and 23, inserted in the Collection of Angezise, book III. art. xv. This is agreeable to that of Charles the Bald, in the year 854, "apud Attiniacum," art. 6.

f "Undecunque legitime exigebatur."—Ibid.

g In the year 812, arts. 10 and 11, edition of Baluzius, tom. i. p. 398.

saries in the provinces to make an exact inquiry into all the census that belonged in former times to the king's demesne? *h* And of that *i* in which he disposes of the census paid by those *j* of whom they are demanded? What can that other capitulary mean *k* in which we read, "If any person has acquired a tributary land *l* on which we were accustomed to levy the census"? And that other, in fine,*m* in which Charles the Bald *n* makes mention of feudal lands whose census had from time immemorial belonged to the king?

Observe that there are some passages which seem at first sight to be contrary to what I have said, and yet confirm it. We have already seen that the freemen in the monarchy were obliged only to furnish particular carriages; the capitulary just now cited gives to this the name of census,*o* and opposes it to the census paid by the bondmen.

Besides, the Edict of Pistes *p* notices those freemen who are obliged to pay the royal census for their head and for their cottages,*q* and who had sold themselves during the famine. The king orders them to be ransomed. This is because those who were manumitted by the king's letters *r* did not, generally speaking, acquire a full and perfect liberty,*s* but they paid *censum in capite;* and these are the people here meant.

We must, therefore, waive the idea of a general and universal census, derived from that of the Romans, from which the rights of the lords are also supposed to have been derived by usurpation. What was called *census* in the French monarchy, independently of the abuse made of that word, was a particular tax imposed on the bondmen by their masters.

I beg the reader to excuse the trouble I must give him with such a number of citations. I should be more concise did I

h "Undecunque antiquitus ad partem regis venire solebant."—Capitulary of the year 812, arts. 10 and 11.

i In the year 813, art. 6, edition of Baluzius, tom. 1, p. 508.

j "De illis unde censa exigunt."—Capitulary of the year 813, art. 6.

k Book IV. of the Capitularies, art. 37, and inserted in the law of the Lombards.

l "Si quis terram tributariam, unde census ad partem nostram exire solebat, susceperit."—Book IV., of the Capitularies, art. 37.

m In the year 877, art. 8.

n "Unde census ad partem regis exivit antiquitus."—Capitulary of the year 805, art. 8.

o "Censibus vel paraveredis quos Franci homines ad regiam potestatem exsolvere debent."

p In the year 864, art. 34, edition of Baluzius, p. 192.

q "De illis francis hominibus qui censum regium de suo capite et de suis recellis debeant."—Ibid.

r The 28th article of the same edict explains this extremely well; it even makes a distinction between a Roman freedman and a Frank freedman: and we likewise see there that the census was not general; it deserves to be read.

s As appears by the Capitulary of Charlemagne in the year 813, which we have already quoted.

not meet with the Abbé du Bos's book on the establishment of the French monarchy in Gaul, continually in my way. Nothing is a greater obstacle to our progress in knowledge, than a bad performance of a celebrated author; because, before we instruct we must begin with undeceiving.

16.—*Of the feudal Lords or Vassals*

I have noticed those volunteers among the Germans, who have followed their princes in their several expeditions. The same usage continued after the conquest. Tacitus mentions them by the name of companions;[t] the Salic law by that of men who have vowed fealty to the king;[u] the formularies of Marculfus[v] by that of the king's "antrustios,"[w] the earliest French historians by that of "leudes,"[x] faithful and loyal; and those of later date by that of vassals and lords.[y]

In the Salic and Ripuarian laws we meet with an infinite number of regulations in regard to the Franks, and only with a few for the antrustios. The regulations concerning the antrustios are different from those which were made for the other Franks; they are full of what relates to the settling of the property of the Franks but mention not a word concerning that of the antrustios. This is because the property of the latter was regulated rather by the political than by the civil law, and was the share that fell to an army, and not the patrimony of a family.

The goods reserved for the feudal lords were called fiscal goods, benefices, honors, and fiefs, by different authors, and in different times.[z]

There is no doubt but the fiefs at first were at will.[a] We find in Gregory of Tours,[b] that Sunegisilus and Gallomanus were deprived of all they held of the exchequer, and no more was left them than their real property. When Gontram raised his nephew Childebert to the throne, he had a private conference with him, in which he named the persons who ought to

t "Comites."

u "Qui sunt in truste regis," tit. 44, art. 4.

v Book I. formulary 18.

w From the word "trew," which signifies "faithful" among the Germans.

x "Leudes," "fideles."

y "Vassalli," "seniores."

z "Fiscalia." See the 14th formulary of Marculfus, book I. It is mentioned in the "Life of St. Maur," "dedit fiscum unum"; and in the "Annals of Metz" in the year 747, "dedit illi comitatus et fiscos plurimos." The goods designed for the support of the royal family were called regalia.

a See the 1st book, tit. 1, of the fiefs; and Cujas on that book.

b Book IX. chap. xxxviii.

be honored with, and those who ought to be deprived of, the fiefs.[c] In a formulary of Marculfus,[d] the king gives in exchange, not only the benefices held by his exchequer, but likewise those which had been held by another. The law of the Lombards opposes the benefices to property.[e] In this, our historians, the formularies, the codes of the different barbarous nations, and all the monuments of those days are unanimous. In fine, the writers of the book of fiefs inform us,[f] that at first the lords could take them back when they pleased, that afterwards they granted them for the space of a year,[g] and that at length they gave them for life.

17.—*Of the military Service of Freemen*

Two sorts of people were bound to military service; the great and lesser vassals, who were obliged in consequence of their fiefs; and the freemen, whether Franks, Romans, or Gauls, who served under the count and were commanded by him and his officers.

The name of freemen was given to those, who on the one hand had no benefits or fiefs, and on the other were not subject to the base services of villanage; the lands they possessed were what they called allodial estates.

The counts assembled the freemen,[h] and led them against the enemy; they had officers under them who were called vicars;[i] and as all the freemen were divided into hundreds, which constituted what they called a borough, the counts had also officers under them, who were denominated *centenarii*, and led the freemen of the borough, or their hundreds, to the field.[j]

This division into hundreds is posterior to the establishment of the Franks in Gaul. It was made by Clotharius and Childebert, with a view of obliging each district to answer for the rob-

c Quos honoraret muneribus, quos ab honore depelleret."—Ibid. lib. VII.

d "Vel reliquis quibuscumque beneficiis, quodcumque ille, vel fiscus noster, in ipsis locis tenuisse noscitur."—Lib. I. formul. 30.

e Liv. III. tit. 8, sec. 3.

f "Antiquissimo enim tempore sic erat in Dominorum potestate connexum, ut quando vellent possent auferre rem in feudum a se datam; postea vero conventum est ut per annum tantum firmitatem haberent, deinde statutum est ut usque ad vitam fidelis produceretur."—"Feudorum," lib. I. tit. 1.

g It was a kind of precarious tenure which the lord consented or refused to renew every year; as Cujas has observed.

h See the Capitulary of Charlemagne in the year 812, arts. 3 and 4, edition of Baluzius, tom. i. p. 491; and the Edict of Pistes in the year 864, art. 26, tom. ii. p. 186.

i "Et habebat unusquisque comes Vicarios et Centenarios secum."—Book II. of the Capitularies, art. 28.

j They were called "compagenses."

beries committed in their division; this we find in the decrees of those princes.[k] A regulation of this kind is to this very day observed in England.

As the counts led the freemen against the enemy, the feudal lords commanded also their vassals or rear-vassals; and the bishops, abbots, or their advocates[l] likewise commanded theirs.[m]

The bishops were greatly embarrassed and inconsistent with themselves;[n] they requested Charlemagne not to oblige them any longer to military service; and when he granted their request, they complained that he had deprived them of the public esteem; so that this prince was obliged to justify his intentions upon this head. Be that as it may, when they were exempted from marching against the enemy I do not find that their vassals were led by the counts; on the contrary, we see that the kings or the bishops chose one of their feudatories to conduct them.[o]

In a Capitulary of Louis the Debonnaire,[p] this prince distinguishes three sorts of vassals, those belonging to the king, those to the bishops, and those to the counts. The vassals of a feudal lord were not led against the enemy by the count, except some employment in the king's household hindered the lord himself from commanding them.[q]

But who is it that led the feudal lords into the field? No doubt the king himself, who was always at the head of his faithful vassals. Hence we constanly find in the Capitularies a distinction made between the king's vassals and those of the bishops.[r] Such brave and magnanimous princes as our kings did not take the field to put themselves at the head of an ecclesiastic militia; these were not the men they chose to conquer or to die with.

k Published in the year 595, art. 1. See the Capitularies, edition of Baluzius, p. 20. These regulations were undoubtedly made by agreement.

l "Advocati."

m Capitulary of Charlemagne in the year 812, arts. 1 and 5, edition of Baluzius, tom. i. p. 490.

n See the Capitulary of the year 803, published at Worms, edition of Baluzius, pp. 408 and 410.

o Capitulary of Worms in the year 803, edition of Baluzius, page 409; and the Council in the year 845, under Charles the Bald, "in verno palatio," edition of Baluzius, tom. ii. p. 17, art. 8.

p The 5th Capitulary of the year 819, art. 27, edition of Baluzius, p. 618.

q "De vassis dominicis qui adhuc intra casam serviunt et tamen beneficia habere noscuntur, statutum est ut quicumque ex eis cum domino imperatore domi remanserint, vassallos suos casatos secum non retineant; sed cum comite, cujus pagenses sunt, ire permittant."—Second Capitulary in the year 812, art. 7, edition of Baluzius, tom. i. p. 494.

r First Capitul. of the year 812, art. 5, "de hominibus nostris, et episcoporum et abbatum qui vel beneficia vel talia propria habent," etc., edition of Baluzius, tom. i. p. 490.

But these lords likewise carried their vassals and rear-vassals with them, as we can prove by the Capitulary in which Charlemagne ordains that every freeman who has four manors, either in his own property or as a benefice from somebody else, should march against the enemy or follow his lord.[s] It is evident, that Charlemagne means, that the person who had a manor of his own should march under the count and he who held a benefice of a lord should set out along with him.

And yet the Abbé du Bos pretends,[t] that when mention is made in the Capitularies of tenants who depended on a particular lord, no others are meant than bondmen; and he grounds his opinion on the law of the Visigoths and the practice of that nation. It is much better to rely on the Capitularies themselves; that which I have just quoted says expressly the contrary. The treaty between Charles the Bald and his brothers notices also those freemen who might choose to follow either a lord or the king; and this regulation is conformable to a great many others.

We may, therefore, conclude, that there were three sorts of military services; that of the king's vassals, who had other vassals under them; that of the bishops or of the other clergy and their vassals, and, in fine, that of the count, who commanded the freemen.

Not but the vassals might be also subject to the count; as those who have a particular command are subordinate to him who is invested with a more general authority.

We even find that the count and the king's commissaries might oblige them to pay the fine when they had not fulfilled the engagements of their fief. In like manner, if the king's vassals committed any outrage[u] they were subject to the correction of the count, unless they choose to submit rather to that of the king.

18.—*Of the double Service*

It was a fundamental principle of the monarchy that whosoever was subject to the military power of another person was subject also to his civil jurisdiction. Thus the Capitulary of

[s] In the year 812, chap. 1, edition of Baluzius, p. 499, "ut omnis homo liber quatuor mansos vestitos de proprio suo, sive de alicujus beneficio habet ipse se præparet, et ipse in hostem pergat, sive cum seniore suo."

[t] Tom. iii. book VI. chap. iv. p. 299, "Establishment of the French Monarchy."

[u] Capitulary of the year 882, art. 11, "apud vernis palatium," edition of Baluzius, tom. ii. p. 289.

Louis the Debonnaire,[v] in the year 815, makes the military power of the count and his civil jurisdiction over the freemen keep always an equal pace. Thus the *placita* [w] of the count who carried the freemen against the enemy were called the *placita* of the freemen;[x] whence undoubtedly came this maxim, that the questions relating to liberty could be decided only in the count's *placita*, and not in those of his officers. Thus the count never led the vassals [y] belonging to the bishops or to the abbots, against the enemy, because they were not subject to his civil jurisdiction. Thus, he never commanded the rear-vassals belonging to the king's vassals. Thus the glossary of the English laws informs us,[z] that those to whom the Saxons gave the name of *coples* [a] were by the Normans called counts, or companions, because they shared the justiciary fines with the king. Thus we see, that at all times the duty of a vassal towards his lord [b] was to bear arms,[c] and to try his peers in his court.

One of the reasons which produced this connection between the judiciary right and that of leading the forces against the enemy was because the person who led them exacted at the same time the payment of the fiscal duties, which consisted in some carriage services due by the freemen, and in general in certain judiciary profits, of which we shall treat hereafter.

The lords had the right of administering justice in their fief, by the same principle as the counts had it in their counties. And, indeed, the counties in the several variations that happened at different times always followed the variations of the fiefs; both were governed by the same plan, and by the same principles. In a word, the counts in their counties were lords, and the lords in their seigniories were counts.

It has been a mistake to consider the counts as civil officers, and the dukes as military commanders. Both were equally civil and military officers: [d] the whole difference consisted in

v Arts. 1, 2, and the Council "in verno palatio" of the year 845, art. 8, edition of Baluzius, tom. ii. p. 17.

w Or assizes.

x Capitularies, book 4th of the Collection of Angezise, art. 57; and the 5th Capitulary of Louis the Debonnaire in the year 819, art. 14, edition of Baluzius, tom. i. p. 615.

y See note *o*, page 192.

z It is to be found in the Collection of William Lambard, "de priscis Anglorum legibus."

a In the word "satrapia."

b This is well explained by the assizes of Jerusalem, chaps. ccxxi. and ccxxii.

c The advowees of the church ("advocati") were equally at the head of their placita and of their militia.

d See the 8th formulary of Marculfus, book I., which contains the letters given to a duke, patrician, or count; and invests them with the civil jurisdiction, and the fiscal administration.

the duke's having several counts under him, though there were counts who had no duke over them, as we learn from Fredegarius.*e*

It will be imagined, perhaps, that the government of the Franks must have been very severe at that time, since the same officers were invested with a military and civil power, nay, even with a fiscal authority, over the subjects; which in the preceding books I have observed to be distinguishing marks of despotism.

But we must not believe that the counts pronounced judgment by themselves, and administered justice in the same manner as the bashaws in Turkey; in order to judge affairs, they assembled a kind of assizes, where the principal men appeared.

To the end we may thoroughly understand what relates to the judicial proceedings in the formulas, in the laws of the barbarians and in the Capitularies, it is proper to observe that the functions of the count, of the *grafio* or fiscal judge, and the *centenarius* were the same; that the judges, the *rathimburghers*, and the aldermen were the same persons under different names. These were the count's assistants, and were generally seven in number; and as he was obliged to have twelve persons to judge,*f* he filled up the number with the principal men.*g*

But whoever had the jurisdiction, the king, the count, the *grafio*, the *centenarius*, the lords, or the clergy, they never tried causes alone; and this usage, which derived its origin from the forests of Germany, was still continued even after the fiefs had assumed a new form.

With regard to the fiscal power, its nature was such that the count could hardly abuse it. The rights of the prince in respect to the freemen were so simple that they consisted only, as we have already observed, in certain carriages which were demanded of them on some public occasions.*h* And as for the judiciary rights, there were laws which prevented misdemeanors.*i*

e "Chronicle," chap. lxxviii., in the year 636.

f See concerning this subject the Capitularies of Lewis the Debonnaire, added to the Salic law, art. 2, and the formula of judgments given by Du Cange in the words "boni homines."

g "Per bonos homines," sometimes there were none but principal men. See the appendix to the formularies of Marculfus, chap. li.

h And some tolls on rivers, of which I have spoken already.

i See the law of the Ripuarians, tit. 89; and the law of the Lombards, book II. tit. 52, sec. 9.

19.—*Of Compositions among the barbarous Nations*

Since it is impossible to gain any insight into our political law unless we are thoroughly acquainted with the laws and manners of the German nations, I shall, therefore, pause here awhile, in order to inquire into those manners and laws.

It appears by Tacitus, that the Germans knew only two capital crimes; they hanged traitors, and drowned cowards; these were the only public crimes among that people. When a man had injured another, the relatives of the person injured took share in the quarrel, and the offence was cancelled by a satisfaction.[j] This satisfaction was made to the person offended, when capable of receiving it; or to the relatives if they had been injured in common, or if by the decease of the party aggrieved or injured the satisfaction had devolved to them.

In the manner mentioned by Tacitus, these satisfactions were made by the mutual agreement of the parties; hence in the codes of the barbarous nations these satisfactions are called compositions.

The law of the Frisians[k] is the only one I find that has left the people in that situation in which every family at variance was in some measure in the state of nature, and in which being unrestrained either by a political or civil law they might give freedom to their revenge till they had obtained satisfaction. Even this law was moderated; a regulation was made[l] that the person whose life was sought after should be unmolested in his own house, as also in going and coming from church and the court where causes were tried.

The compilers of the Salic law[m] cite an ancient usage of the Franks, by which a person who had dug a corpse out of the ground, in order to strip it, should be banished from society till the relatives had consented to his being readmitted. And as before that time strict orders were issued to everyone, even to the offender's own wife, not to give him a morsel of bread, or to receive him under their roofs, such a person was in re-

j "Suscipere tam inimicitias, seu patris, seu propinqui, quam amicitias, necesse est: nec implacabiles durant; luitur enim etiam homicidium certo armentorum ac pecorum numero, recipitque satisfactionem universa domus."—Tacitus, "de Moribus Germanorum."

k See this law in the 2d title on murders; and Vulemar's addition on robberies.

l "Additio sapientum," tit. i. sec. 1.

m Salic law, tit. 57, sec. 5, tit. 17, sec. 2.

spect to others, and others in respect to him, in a state of savagery till an end was put to this state by a composition.

This excepted, we find that the sages of the different barbarous nations thought of determining by themselves what would have been too long and too dangerous to expect from the mutual agreement of the parties. They took care to fix the value of the composition which the party wronged or injured was to receive. All those barbarian laws are in this respect most admirably exact; the several cases are minutely distinguished,[n] the circumstances are weighed, the law substitutes itself in the place of the person injured and insists upon the same satisfaction as he himself would have demanded in cold blood.

By the establishing of those laws, the German nations quitted that state of nature in which they seemed to have lived in Tacitus's time.

Rotharis declares, in the law of the Lombards,[o] that he had increased the compositions allowed by ancient custom for wounds, to the end that the wounded person being fully satisfied, all enmities should cease. And, indeed, as the Lombards, from a very poor people had grown rich by the conquest of Italy, the ancient compositions had become frivolous, and reconcilements prevented. I do not question but this was the motive which obliged the other chiefs of the conquering nations to make the different codes of laws now extant.

The principal composition was that which the murderer paid to the relatives of the deceased. The difference of conditions produced a difference in the compositions.[p] Thus in the law of the Angli, there was a composition of six hundred sous for the murder of an adeling, two hundred for that of a freeman, and thirty for killing a bondman. The largeness, therefore, of the composition for the life of a man was one of his chief privileges; for besides the distinction it made of his person, it likewise established a greater security in his favor among rude and boisterous nations.

This we are made sensible of by the law of the Bavarians:[q] it gives the names of the Bavarian families who received a

n The Salic laws are admirable in this respect, see especially the titles 3, 4, 5, 6, and 7, which related to the stealing of cattle.

o Book I. tit. 7, sec. 15.

p See the law of the Angli, tit. i. secs. 1, 2, and 4; ibid. tit. v. sec. 6; the law of the Bavarians, tit. i. chaps. 8 and 9, and the law of the Frisians, tit. xv.

q Tit. 2, chap. xx.

double composition, because they were the first after the Agilolfings.[r] The Agilolfings were of the ducal race, and it was customary with this nation to choose a duke out of that family; these had a quadruple composition. The composition for a duke exceeded by a third that which had been established for the Agilolfings. "Because he is a duke," says the law, "a greater honor is paid to him than to his relatives."

All these compositions were valued in money. But as those people, especially when they lived in Germany, had very little specie, they might pay it in cattle, corn, movables, arms, dogs, hawks, lands, etc.[s] The law itself frequently determined the value of those things; which explains how it was possible for them to have such a number of pecuniary punishments with so very little money.[t]

These laws were, therefore, employed in exactly determining the difference of wrongs, injuries, and crimes; to the end that everyone might know how far he had been injured or offended, the reparation he was to receive, and especially that he was to receive no more.

In this light it is easy to conceive, that a person who had taken revenge after having received satisfaction was guilty of a heinous crime. This contained a public as well as a private offence; it was a contempt of the law of itself; a crime which the legislators never failed to punish.[u]

There was another crime which above all others was considered as dangerous, when those people lost something of their spirit of independence, and when the kings endeavored to establish a better civil administration; this was, the refusing to give or to receive satisfaction.[v] We find in the different codes of the laws of the barbarians that the legislators were peremptory on this article.[w] In effect, a person who refused to

r Hozidra, Ozza, Sagana, Habalingua, Anniena.—Ibid.

s Thus the law of Ina valued life by a certain sum of money, or by a certain portion of land.—"Leges Inæ regis, titulo de villico regio de priscis Anglorum legibus," Cambridge, 1644.

t See the law of the Saxons, which makes this same regulation for several people, chap. xviii. See also the law of the Ripuarians, tit. 36, sec. 11, the law of the Bavarians, tit. i. secs. 10 and 11. "Si aurum non habet, donet aliam pecuniam, mancipia, terram," etc.

u See the law of the Lombards, book I. tit. 25, sec. 21; ibid. book I. tit. 9, secs. 8 and 34; ibid. sec. 38, and the Capitulary of Charlemagne in the year 802, chap. xxxii., containing an instruction given to those whom he sent into the provinces.

v See in Gregory of Tours, book VII. chap. xlvii., the detail of a process, wherein a party loses half the composition that had been adjudged to him, for having done justice to himself, instead of receiving satisfaction, whatever injury he might have afterwards received.

w See the law of the Saxons, chap. iii. sec. 4; the law of the Lombards, book I. tit. 37, secs. 1 and 2; and the

receive satisfaction wanted to preserve his right of prosecution; he who refused to give it left the right of prosecution to the person injured; and this is what the sages had reformed in the institutions of the Germans, whereby people were invited but not compelled to compositions.

I have just now made mention of a text of the Salic law, in which the legislator left the party offended at liberty to receive or to refuse satisfaction; it is the law by which a person who had stripped a dead body was expelled from society till the relatives upon receiving satisfaction petitioned for his being readmitted.[x] It was owing to the respect they had for sacred things, that the compilers of the Salic laws did not meddle with the ancient usage.

It would have been absolutely unjust to grant a composition to the relatives of a robber killed in the act, or to the relatives of a woman who had been repudiated for the crime of adultery. The law of the Bavarians allowed no compositions in the like cases, but punished the relatives who sought revenge.[y]

It is no rare thing to meet with compositions for involuntary actions in the codes of the laws of the barbarians. The law of the Lombards is generally very prudent; it ordained[z] that in those cases the compositions should be according to the person's generosity; and that the relatives should no longer be permitted to pursue their revenge.

Clotharius II made a very wise decree; he forbade the person robbed to receive any clandestine composition, and without an order from the judge.[a] We shall presently see the motive of this law.

20.—*Of what was afterwards called the Jurisdiction of the Lords*

Besides the composition which they were obliged to pay to the relatives for murders or injuries, they were also under a necessity of paying a certain duty which the codes of the bar-

law of the Alemans, tit. 45, secs. 1 and 2. This last law gave leave to the party injured to right himself upon the spot, and in the first transport of passion. See also the Capitularies of Charlemagne in the year 779, chap. xxii., in the year 802, chap. xxxii., and also that of the year 805, chap. v.

x The compilers of the law of the Ripuarians seem to have softened this. See the 85th title of those laws.

y See the decree of Tassillon, "de popularibus legibus," arts. 3, 4, 10, 16, 19; the law of the Angli, tit. vii. sec. 4.

z Book I. tit. ix. sec. 4.

a "Pactus pro tenore pacis inter Childebertum et Clotarium, anno 593, et decretio Clotarii 2 regis, circa annum 595," chap. xi.

barian laws called *fredum.*[b] I intend to treat of it at large; and in order to give an idea of it, I begin with defining it as a recompense for the protection granted against the right of vengeance. Even to this day, *fred* in the Swedish language signifies peace.

The administration of justice among those rude and unpolished nations was nothing more than granting to the person who had committed an offence, a protection against the vengeance of the party offended, and obliging the latter to accept of the satisfaction due to him: insomuch that among the Germans, contrary to the practice of all other nations, justice was administered in order to protect the criminal against the party injured.

The codes of the barbarian laws have given us the cases in which the *freda* might be demanded. When the relatives could not prosecute, they allowed of no *fredum;* and, indeed, when there was no prosecution there could be no composition for a protection against it. Thus, in the law of the Lombards,[c] if a person happened to kill a freeman by accident, he paid the value of the man killed, without the *fredum;* because, as he had killed him involuntarily, it was not the case in which the relatives were allowed the right of prosecution. Thus in the law of the Ripuarians,[d] when a person was killed with a piece of wood, or with any instrument made by man, the instrument or the wood were deemed culpable, and the relatives seized upon them for their own use, but were not allowed to demand the *fredum.*

In like manner, when a beast happened to kill a man, the same law established a composition without the *fredum,* because the relatives of the deceased were not offended.[e]

In fine, it was ordained by the Salic law,[f] that a child who had committed a fault before the age of twelve should pay the composition without the *fredum:* as he was not yet able to bear arms he could not be in the case in which the party injured, or his relatives, had a right to demand satisfaction.

b When it was not determined by the law it was generally the third of what was given for the composition, as appears in the law of the Ripuarians, chap. lxxxix., which is explained by the third Capitulary of the year 813.—Edition of Baluzius, tom. i. p. 512.

c Book I. tit. 9, sec. 17, edition of Lindembrock.

d Tit. 70.

e Tit. 46. See also the law of the Lombards, book I. chap. xxi. sec. 3, Lindembrock's edition, "si caballus cum pede," etc.

f Tit. 28, sec. 6.

It was the criminal that paid the *fredum* for the peace and security of which he had been deprived by his crime, and which he might recover by protection. But a child did not lose this security, he was not a man; and consequently could not be expelled from human society.

This *fredum* was a local right in favor of the person who was judge of the district.[g] Yet the law of the Ripuarians[h] forbade him to demand it himself: it ordained that the party who had gained the cause should receive it and carry it to the exchequer, to the end that there might be a lasting peace, says the law among the Ripuarians.

The greatness of the *fredum* was proportioned to the degree of protection: thus the *fredum* for the king's protection was greater than what was granted for the protection of the count, or of the other judges.[i]

Here I see the origin of the jurisdiction of the lords. The fiefs comprised very large territories, as appears from a vast number of records. I have already proved that the kings raised no taxes on the lands belonging to the division of the Franks; much less could they reserve to themselves any duties on the fiefs. Those who obtained them had in this respect a full and perfect enjoyment, reaping every possible emolument from them. And as one of the most considerable emoluments was the justiciary profits (*freda*),[j] which were received according to the usage of the Franks, it followed thence that the person seized of the fief was also seized of the jurisdiction, the exercise of which consisted of the compositions made to the relatives, and of the profits accruing to the lord; it was nothing more than ordering the payment of the compositions of the law, and demanding the legal fines. We find by the formularies containing confirmation of the perpetuity of a fief in favor of a feudal lord,[k] or of the privileges of fiefs in favor of churches,[l] that the fiefs were possessed of this right. This appears also

g As appears by the decree of Clotharius II. in the year 595, "fredus tamen judici in cujus pago est reservetur."

h Tit. 85.

i "Capitulare incerti anni," chap. lvii., in Baluzius, tom. i. p. 515, and it is to be observed, that what was called "fredum" or "faida," in the monuments of the first race, is known by the name of "bannum" in those of the second race, as appears from the Capitulary "de partibus Saxoniæ," in the year 789.

j See the Capitulary of Charlemagne, "de villis," where he ranks these freda among the great revenues of what was called "villæ," or the king's demesnes.

k See the 3d, 8th, and 17th formulas, book I. of Marculfus.

l See the 2d, 3d, and 4th formulas of Marculfus, book I.

from an infinite number of charters *m* mentioning a prohibition to the king's judges or officers of entering upon the territory in order to exercise any act of judicature whatsoever, or to demand any judiciary emolument. When the king's judges could no longer make any demand in a district they never entered it; and those to whom this district was left performed the same functions as had been exercised before by the judges.

The king's judges are forbidden also to oblige the parties to give security for their appearing before them; it belonged, therefore, to the person who had received the territory in fief to demand this security. They mention also that the king's commissaries shall not insist upon being accommodated with a lodging; in effect, they no longer exercised any function in those districts.

The administration, therefore, of justice, both in the old and new fiefs, was a right inherent in the very fief itself, a lucrative right which constituted a part of it. For this reason it had been considered at all times in this light; whence this maxim arose, that jurisdictions are patrimonial in France.

Some have thought that the jurisdictions derived their origin from the manumissions made by the kings and lords, in favor of their bondmen. But the German nations, and those descended from them, are not the only people who manumitted their bondmen, and yet they are the only people that established patrimonial jurisdictions. Besides, we find by the formularies of Marculfus *n* that there were freemen dependent on these jurisdictions in the earliest times: the bondmen were, therefore, subject to the jurisdiction, because they were upon the territory; and they did not give rise to the fiefs for having been annexed to the fief.

Others have taken a shorter cut; the lords, say they, and this is all they say, usurped the jurisdictions. But are the nations descended from Germany the only people in the world that usurped the rights of princes? We are sufficiently informed by history that several other nations have encroached upon their

m See the collections of those charters, especially that at the end of the 5th volume of the "Historians of France," published by the Benedictine monks.

n See the 3d, 4th, and 14th of the first book, and the Charter of Charlemagne, in the year 771, in Martene, tom. i. Anecdot. collect. 11, "præcipientes jubemus ut ullus judex publicus . . . homines ipsius ecclesiæ et monasterii ipsius Morbacensis tam ingenuos quam et servos, et qui super eorum terras manere," etc.

sovereigns, and yet we find no other instance of what we call the jurisdiction of the lords. The origin of it is, therefore, to be traced in the usages and customs of the Germans.

Whoever has the curiosity to look into Loyseau *o* will be surprised at the manner in which this author supposes the lords to have proceeded, in order to form and usurp their different jurisdictions. They must have been the most artful people in the world; they must have robbed and plundered, not after the manner of a military nation, but as the country justices and the attorneys rob one another. Those brave warriors must be said to have formed a general system of politics throughout all the provinces of the kingdom, and in so many other countries in Europe; Loyseau makes them reason as he himself reasoned in his closet.

Once more; if the jurisdiction was not a dependence of the fief, how come we everywhere to find, that the service of the fief was to attend the king or the lord, both in their courts and in the army? *p*

21.—*Of the Territorial Jurisdiction of the Churches*

The churches acquired very considerable property. We find that our kings gave them great seigniories, that is, great fiefs; and we find jurisdictions established at the same time in the demesnes of those churches. Whence could so extraordinary a privilege derive its origin? It must certainly have been in the nature of the grant. The church land had this privilege because it had not been taken from it. A seigniory was given to the Church; and it was allowed to enjoy the same privileges as if it had been granted to a vassal. It was also subjected to the same service as it would have paid to the state if it had been given to a layman, according to what we have already observed.

The churches had, therefore, the right of demanding the payment of compositions in their territory, and of insisting upon the *fredum;* and as those rights necessarily implied that of hindering the king's officers from entering upon the territory to demand these *freda* and to exercise acts of judicature, the right which ecclesiastics had of administering justice in their

o "Treatise of Village Jurisdictions," Loyseau.

p See Mons. Ducange on the word "hominium."

own territory was called immunity, in the style of the formularies, of the charters, and of the Capitularies.[q]

The law of the Ripuarians[r] forbids the freedom of the churches[s] to hold the assembly for administering justice in any other place than in the church where they were manumitted.[t] The churches had, therefore, jurisdictions even over freemen, and held their *placita* in the earliest times of the monarchy.

I find in the "Lives of the Saints,"[u] that Clovis gave to a certain holy person power over a district of six leagues, and exempted it from all manner of jurisdiction. This, I believe, is a falsity, but it is a falsity for a very ancient date; both the truth and the fiction contained in that life are in relation to the customs and laws of those times, and it is these customs and laws we are investigating.[v]

Clotharius II orders the bishops or the nobility who are possessed of estates in distant parts, to choose upon the very spot those who are to administer justice, or to receive the judiciary emoluments.[w]

The same prince regulates the judiciary power between the ecclesiastic courts and his officers.[x] The Capitulary of Charlemagne in the year 802 prescribes to the bishops and abbots the qualifications necessary for their officers of justice. Another Capitulary of the same prince inhibits the royal officers[y] to exercise any jurisdiction over those who are employed in cultivating church lands, except they entered into that state by fraud, and to exempt themselves from contributing to the public charges.[z] The bishops assembled at Rheims made a declaration that the vassals belonging to the respective churches are within their immunity.[a] The Capitulary of Charlemagne in the year 806 ordains that the churches should have both crim-

q See the 3d and 4th formularies of Marculfus, book I.

r "Ne aliubi nisi ad ecclesiam, ubi relaxati sunt, mallum teneant," tit. lviii. sec. 1; see also sec. 19; Lindembrock's edition.

s "Tabulariis."

t "Mallum."

u "Vita St. Germeri, Episcopi Tolosani apud Bollandianos 16 Maii."

v See also the life of St. Melanius, and that of St. Deicola.

w In the Council of Paris, in the year 615. "Episcopi vel potentes, qui in aliis possident regionibus, judices vel missos discussores de aliis provinciis non instituant, nisi de loco qui justitiam percipiant et aliis reddant," art. 19. See also the 12th art.

x Ibid. art. 5.

y In the law of the Lombards, book II. tit. 44, chap. ii., Lindembrock's edition.

z "Servi Aldiones, libellarii antiqui, vel alii noviter facti."—Ibid.

a Letter in the year 858, art. 7, in the Capitularies, p. 108. "Sicut illæ res et facultates, in quibus vivunt clerici, ita et illæ sub consecratione immunitatis, sunt de quibus debent militare vassalli."

inal and civil jurisdiction over those who live upon their lands.[b] In fine, as the Capitulary of Charles the Bald[c] distinguishes between the king's jurisdiction, that of the lords, and that of the church, I shall say nothing further upon this subject.[d]

22.—*That the Jurisdictions were established before the End of the Second Race*

It has been pretended that the vassals usurped the jurisdiction in their seigniories, during the confusion of the second race. Those who choose rather to form a general proposition than to examine it found it easier to say that the vassals did not possess than to discover how they came to possess. But the jurisdictions do not owe their origin to usurpations; they are derived from the primitive establishment, and not from its corruption.

"He who kills a freeman," says the law of the Bavarians, "shall pay a composition to his relatives if he has any; if not, he shall pay it to the duke, or to the person under whose protection he had put himself in his lifetime."[e] It is well known what it was to put one's self under the protection of another for a benefice.

"He who had been robbed of his bondman," says the law of the Alemans, "shall have recourse to the prince to whom the robber is subject; to the end that he may obtain a composition."[f]

"If a *centenarius*," says the decree of Childebert, "finds a robber in another hundred than his own, or in the limits of our faithful vassals, and does not drive him out, he shall be answerable for the robber, or purge himself by oath."[g] There was, therefore, a difference between the district of the *centenarii* and that of the vassals.

b It is added to the law of the Bavarians, art. 8. See also the 3d art. Lindembrock's edition, p. 444. "Imprimis omnium jubendum est ut habeant ecclesiæ earum justitias, et in vitâ illorum qui habitant in ipsis ecclesiis et post, tam in pecuniis quam et in substantiis eorum."

c In the year 857, "in synodo apud Carisiacum," art. 4, edition of Baluzius, p. 96.

d See the letter written by the bishops assembled at Rheims, in the year 858 art. 7, in the Capitularies Baluzius's edition, p. 108. "Sicut illæ res et facultates, in quibus vivunt clerici, ita et illæ sub consecratione immunitatis sunt de quibus debent militare vassalli," etc.

e Tit. iii. chap. xii., Lindembrock's edition.

f Tit. 85.

g In the year 595, arts. 11 and 12, edition of the Capitularies by Baluzius, p. 19. "Pari conditione convenit ut si una centena in alia centena vestigium secuta fuerit et invenerit, vel in quibuscunque fidelium nostrorum terminis vestigium miserit, et ipsum in aliam centenam minime expellere potuerit, aut convictus reddat latronem," etc.

This decree of Childebert[h] explains the constitution of Clotharius of the same year, which being given for the same occasion and on the same matter differs only in the terms; the constitution calling *in truste* what by the decree is styled *in terminis fidelium nostrorum.* Messieurs Bignon and Ducange, who pretend that *in truste* signified another king's desmesne, are mistaken in their conjecture.[i]

Pepin, King of Italy, in a constitution that had been made as well for the Franks as for the Lombards,[j] after imposing penalties on the counts and other royal officers for prevarications or delays in the administration of justice, ordains that if it happens that a Frank or a Lombard, possessed of a fief, is unwilling to administer justice, the judge to whose district he belongs shall suspend the exercise of his fief, and in the meantime, either the judge or his commissary shall administer justice.[k]

It appears by a Capitulary of Charlemagne,[l] that the kings did not levy the *freda* in all places. Another Capitulary of the same prince shows the feudal laws[m] and feudal court to have been already established. Another of Louis the Debonnaire, ordains, that when a person possessed of a fief does not administer justice,[n] or hinders it from being administered, the king's commissaries shall live in his house at discretion, till justice be administered. I shall likewise quote two Capitularies of Charles the Bald, one of the year 861;[o] where we find the particular jurisdictions established, with judges and subordinate officers: and the other of the year 864,[p] where he makes a dis-

h "Si vestigius comprobatur latronis tamen præsentia nihil longe mulctando; aut si persequens latronem suum comprehenderit, integram sibi compositionem accipiat. Quod si in truste invenitur, medietatem compositionis trustis adquirat, et capitale exigat a latrone," arts. 2 and 3.

i See the Glossary on the word "trustis."

j Inserted in the law of the Lombards, book II. tit. lii. sec. 14. It is the Capitulary of the year 793, in Baluzius, p. 544, art. 10.

k "Et si forsitan Francus aut Longobardus habens beneficium justitiam facere noluerit, ille judex in cujus ministerio fuerit, contradicat illi beneficium suum, interim, dum ipse aut missus ejus justitiam faciat." See also the same law of the Lombards, book II. tit. 52, sec. 2, which relates to the Capitulary of Charlemagne of the year 779, art. 21.

l The third of the year 812, art. 10.

m The second of the year 813, Baluzius's edition.

n Capitulare quintum anni 819, art. 23, Baluzius's edition, p. 617. "Ut ubicumque missi, aut episcopum, aut abbatem, aut alium quemlibet honore prædituin invenerint, qui justitiam facere noluit vel prohibuit, de ipsius rebus vivant quandiu in eo loco justitias facere debent."

o Edictum in Carisiaco in Baluzius, tom. ii. p. 152, "unusquisque advocatus pro omnibus de suâ advocatione . . . in conveniente ut cum ministerialibus de suâ advocatione quos invenerit contra hunc bannum nostrum fecisse . . . castiget."

p Edictum Pistense, art. 18, Baluzius's edition, tom. ii. p. 181. "Si in fiscum nostrum vel in quamcunque immunitatem aut alicujus potentis potestatem vel proprietatem confugerit," etc.

tinction between his own seigniories and those of private persons.

We have not the original grants of the fiefs, because they were established by the partition which is known to have been made among the conquerors. It cannot, therefore, be proved by original contracts, that the jurisdictions were at first annexed to the fiefs: but if in the formularies of the confirmations, or of the translations of those fiefs in perpetuity, we find, as already has been observed, that the jurisdiction was there established; this judiciary right must certainly have been inherent in the fief and one of its chief privileges.

We have a far greater number of records that establish the patrimonial jurisdiction of the clergy in their districts, than there are to prove that of the benefices or fiefs of the feudal lords; for which two reasons may be assigned. The first, that most of the records now extant were preserved or collected by the monks, for the use of their monasteries. The second, that the patrimony of the several churches having been formed by particular grants, and by a kind of derogation from the order established, they were obliged to have charters granted to them; whereas the concessions made to the feudal lords being consequences of the political order, they had no occasion to demand, and much less to preserve, a particular charter. Nay the kings were oftentimes satisfied with making a simple delivery with the sceptre, as appears from the "Life of St. Maur."

But the third formulary of Marculfus sufficiently proves that the privileges of immunity, and consequently that of jurisdiction, were common to the clergy and the laity, since it is made for both.[q] The same may be said of the constitution of Clotharius II.[r]

23.—*General Idea of the Abbé du Bos's Book on the Establishment of the French Monarchy in Gaul*

Before I finish this book, it will not be improper to write a few strictures on the Abbé du Bos's performance, because my notions are perpetually contrary to his; and if he has hit on the truth I must have missed it.

q Lib. 1. "Maximum regni nostri augere credimus monimentum, si beneficia opportuna locis ecclesiarum aut cui volueris dicere, benevola deliberatione concedimus."

r I have already quoted it in the preceding chapter, "Episcopi vel potentes."

This performance has imposed upon a great many because it is penned with art; because the point in question is constantly supposed; because the more it is deficient in proofs the more it abounds in probabilities; and, in fine, because an infinite number of conjectures are laid down as principles, and thence other conjectures are inferred as consequences. The reader forgets he has been doubting in order to begin to believe. And as a prodigious fund of erudition is interspersed, not in the system but around it, the mind is taken up with the appendages, and neglects the principal. Besides, such a vast multitude of researches hardly permit one to imagine that nothing has been found; the length of the way makes us think that we have arrived at our journey's end.

But when we examine the matter thoroughly we find an immense colossus with earthen feet; and it is the earthen feet that render the colossus immense. If the Abbé du Bos's system had been well grounded, he would not have been obliged to write three tedious volumes to prove it; he would have found everything within his subject, and without wandering on every side in quest of what was extremely foreign to it; even reason itself would have undertaken to range this in the same chain with the other truths. Our history and laws would have told him, Do not take so much trouble, we shall be your vouchers.

24.—*The same Subject continued. Reflection on the main Part of the System*

The Abbé du Bos endeavors by all means to explode the opinion that the Franks made the conquest of Gaul. According to his system our kings were invited by the people, and only substituted themselves in the place and succeeded to the rights of the Roman emperors.

This pretension cannot be applied to the time when Clovis, upon his entering Gaul, took and plundered the towns; neither is it applicable to the period when he defeated Syagrius, the Roman commander, and conquered the country which he held; it can, therefore, be referred only to the period when Clovis, already master of a great part of Gaul by open force, was called by the choice and affection of the people to the sovereignty over the rest. And it is not enough that Clovis was received, he

must have been called; the Abbé du Bos must prove that the people chose rather to live under Clovis than under the domination of the Romans or under their own laws. Now the Romans belonging to that part of Gaul not yet invaded by the barbarians were, according to this author, of two sorts: the first were of the Armorican confederacy, who had driven away the Emperor's officers in order to defend themselves against the barbarians, and to be governed by their own laws; the second were subject to the Roman officers. Now, does the abbé produce any convincing proofs that the Romans, who were still subject to the empire, called in Clovis? Not one. Does he prove that the republic of the Armoricans invited Clovis; or even concluded any treaty with him? Not at all. So far from being able to tell us the fate of this republic he cannot even so much as prove its existence; and, notwithstanding, he pretends to trace it from the time of Honorius to the conquest of Clovis, notwithstanding he relates with most admirable exactness all the events of those times; still this republic remains invisible in ancient authors. For there is a wide difference between proving by a passage of Zosimus [s] that under the Emperor Honorius, the country of Armorica [t] and the other provinces of Gaul revolted and formed a kind of republic, and showing us that notwithstanding the different pacifications of Gaul, the Armoricans formed always a particular republic, which continued till the conquest of Clovis; and yet this is what he should have demonstrated by strong and substantial proofs, in order to establish his system. For when we behold a conqueror entering a country, and subduing a great part of it by force and open violence, and soon after find the whole country subdued, without any mention in history of the manner of its being effected, we have sufficient reason to believe that the affair ended as it began.

When we find he has mistaken this point, it is easy to perceive that his whole system falls to the ground; and as often as he infers a consequence from these principles that Gaul was not conquered by the Franks, but that the Franks were invited by the Romans, we may safely deny it.

This author proves his principle by the Roman dignities with

s Hist. lib. vi.

t "Totusque tractus Armoricus aliæque Galliarum provinciæ."—Ibid.

which Clovis was invested: he insists that Clovis succeeded to Childeric his father in the office of *magister militiæ*. But these two offices are merely of his own creation. St. Remigius's letter to Clovis, on which he grounds his opinion, is only a congratulation upon his accession to the crown.[u] When the intent of a writing is so well known why should we give it another turn?

Clovis, towards the end of the reign, was made Consul by the Emperor Anastasius: but what right could he receive from an authority that lasted only one year? It is very probable, says our author, that in the same diploma the Emperor Anastasius made Clovis Proconsul. And, I say, it is very probable he did not. With regard to a fact for which there is no foundation the authority of him who denies is equal to that of him who affirms. But I have also a reason for denying it. Gregory of Tours, who mentions the consulate, says never a word concerning the proconsulate. And even this proconsulate could have lasted only about six months. Clovis died a year and a half after he was created Consul; and we cannot pretend to make the proconsulate an hereditary office. In fine, when the consulate, and, if you will, the proconsulate, were conferred upon him, he was already master of the monarchy, and all his rights were established.

The second proof alleged by the Abbé du Bos is the renunciation made by the Emperor Justinian, in favor of the children and grandchildren of Clovis, of all the rights of the empire over Gaul. I could say a great deal concerning this renunciation. We may judge of the regard shown to it by the kings of the Franks, from the manner in which they performed the conditions of it. Besides, the kings of the Franks were masters and peaceable sovereigns of Gaul; Justinian had not one foot of ground in that country; the Western Empire had been destroyed a long time before, and the Eastern Empire had no right to Gaul, but as representing the Emperor of the West. These were rights upon rights; the monarchy of the Franks was already founded; the regulation of their establishment was made; the reciprocal rights of the persons and of the different nations who lived in the monarchy were admitted, the laws of each nation were given and even reduced to writing.

[u] Tom. ii. book III. chap. xviii. p. 270.

What, therefore, could that foreign renunciation avail to a government already established?

What can the abbé mean by making such a parade of the declamations of all those bishops, who, amidst the confusion and total subversion of the state, endeavor to flatter the conqueror? What else is implied by flattering but the weakness of him who is obliged to flatter? What do rhetoric and poetry prove but the use of those very arts? Is it possible to help being surprised at Gregory of Tours, who, after mentioning the assassinations committed by Clovis, says, that God laid his enemies every day at his feet, because he walked in his ways? Who doubts but the clergy were glad of Clovis's conversion, and that they even reaped great advantages from it? But who doubts at the same time that the people experienced all the miseries of conquest and that the Roman Government submitted to that of the Franks? The Franks were neither willing nor able to make a total change; and few conquerors were ever seized with so great a degree of madness. But to render all the Abbé du Bos's consequences true, they must not only have made no change among the Romans, but they must even have changed themselves.

I could undertake to prove, by following this author's method, that the Greeks never conquered Persia. I should set out with mentioning the treaties which some of their cities concluded with the Persians; I should mention the Greeks who were in Persian pay, as the Franks were in the pay of the Romans. And if Alexander entered the Persian territories, besieged, took, and destroyed the city of Tyre, it was only a particular affair like that of Syagrius. But, behold the Jewish pontiff goes forth to meet him. Listen to the oracle of Jupiter Ammon. Recollect how he had been predicted at Gordium. See what a number of towns crowd, as it were, to submit to him; and how all the satraps and grandees come to pay him obeisance. He put on the Persian dress; this is Clovis's consular robe. Does not Darius offer him one-half of his kingdom? Is not Darius assassinated like a tyrant? Do not the mother and wife of Darius weep at the death of Alexander? Were Quintius Curtius, Arrian, or Plutarch, Alexander's contemporaries? Has not the invention of printing afforded us

great light which those authors wanted?[v] Such is the history of the "Establishment of the French Monarchy in Gaul."

25.—*Of the French Nobility*

The Abbé du Bos maintains, that at the commencement of our monarchy there was only one order of citizens among the Franks. This assertion, so injurious to the noble blood of our principal families, is equally affronting to the three great houses which successively governed this realm. The origin of their grandeur would not, therefore, have been lost in the obscurity of time. History might point out the ages when they were plebeian families; and to make Childeric, Pepin, and Hugh Capet gentlemen, we should be obliged to trace their pedigree among the Romans or Saxons, that is, among the conquered nations.

This author grounds his opinion on the Salic law.[w] By that law, he says, it plainly appears that there were not two different orders of citizens among the Franks: it allowed a composition of two hundred sous for the murder of any Frank whatsoever;[x] but among the Romans it distinguished the king's guest, for whose death it gave a composition of three hundred sous, from the Roman proprietor to whom it granted a hundred, and from the Roman tributary to whom it gave only a composition of forty-five. And as the difference of the compositions formed the principal distinction, he concludes that there was but one order of citizens among the Franks, and three among the Romans.

It is astonishing that his very mistake did not set him right. And, indeed, it would have been very extraordinary that the Roman nobility who lived under the domination of the Franks should have had a larger composition, and been persons of much greater importance than the most illustrious among the Franks, and their greatest generals. What probability is there, that the conquering nation should have so little respect for themselves, and so great a regard for the conquered people? Besides, our author quotes the laws of other barbarous nations which prove that they had different orders of citizens. Now it

v See the preliminary discourse of the Abbé du Bos.

w See the "Establishment of the French Monarchy," vol. iii. book VI. chap. iv. p. 304.

x He cites the 44th title of this law, and the law of the Ripuarians, tits. 7 and 36.

would be a matter of astonishment that this general rule should have failed only among the Franks. Hence he ought to have concluded either that he did not rightly understand or that he misapplied the passages of the Salic law, which is actually the case.

Upon opening this law, we find that the composition for the death of an antrustio,[y] that is, of the king's vassal, was six hundred sous; and that for the death of a Roman, who was the king's guest, was only three hundred.[z] We find there likewise that the composition[a] for the death of an ordinary Frank was two hundred sous;[b] and for the death of an ordinary Roman, was only one hundred.[c] For the death of a Roman tributary,[d] who was a kind of bondman or freed-man, they paid a composition of forty-five sous: but I shall take no notice of this, any more than of the composition for the murder of a Frank bondman or of a Frank freed-man, because this third order of persons is out of the question.

What does our author do? He is quite silent with respect to the first order of persons among the Franks, that is the article relating to the antrustios; and afterwards upon comparing the ordinary Frank, for whose death they paid a composition of two hundred sous, with those whom he distinguishes under three orders among the Romans, and for whose death they paid different compositions, he finds that there was only one order of citizens among the Franks, and that there were three among the Romans.

As the abbé is of opinion that there was only one order of citizens among the Franks, it would have been lucky for him that there had been only one order also among the Burgundians, because their kingdom constituted one of the principal branches of our monarchy. But in their codes we find three sorts of compositions, one for the Burgundians or Roman nobility, the other for the Burgundians or Romans of a middling condition, and the third for those of a lower rank in both nations.[e] He has not quoted this law.

y "Qui in truste dominicâ est," tit. 44, sec. 4, and this relates to the 13th formulary of Marculfus, "de regis Antrustione." See also the title 66, of the Salic law, secs. 3 and 4, and the title 74; and the law of the Ripuarians, tit. 11, and the Capitulary of Charles the Bald, "apud Carisiacum," in the year 877, chap. xx.

z Salic law, tit. 44, sec. 6.

a Ibid., sec. 4.

b Ibid., secs. 1-7.

c Ibid., sec. 15.

d Ibid., sec. 7.

e "Si quis, quolibet casu, dentem optimati Burgundioni vel Romano nobili excusserit, solidos viginti quin-

It is very extraordinary to see in what manner he evades those passages which press him hard on all sides.[f] If you speak to him of the grandees, lords, and the nobility, these, he says, are mere distinctions of respect, and not of order; they are things of courtesy, and not legal privileges; or else, he says, those people belonged to the king's council; nay, they possibly might be Romans: but still there was only one order of citizens among the Franks. On the other hand, if you speak to him of some Franks of an inferior rank,[g] he says they are bondmen; and thus he interprets the decree of Childebert. But I must stop here a little, to inquire further into this decree. Our author has rendered it famous by availing himself of it in order to prove two things: the one that all the compositions we meet with in the laws of the barbarians were only civil fines added to corporal punishments, which entirely subverts all the ancient records;[h] the other, that all freemen were judged directly and immediately by the king,[i] which is contradicted by an infinite number of passages and authorities informing us of the judiciary order of those times.[j]

This decree, which was made in an assembly of the nation,[k] says, that if the judge finds a notorious robber, he must command him to be tied, in order to be carried before the king, *si Francus fuerit;* but if he is a weaker person (*debilior persona*), he shall be hanged on the spot. According to the Abbé du Bos, *Francus* is a freeman, *debilior persona* is a bondman. I shall defer entering for a moment into the signification of the word *Francus*, and begin with examining what can be understood by these words, "a weaker person." In all languages whatsoever, every comparison necessarily supposes three terms, the greatest, the less degree, and the least. If none were here meant but freemen and bondmen, they would have said "a bondman," and not "a man of less power." Therefore,

que cogatur exsolvere; de mediocribus personis ingenuis, tam Burgundionibus quam Romanis, si dens excussus fuerit, decem solidis componatur; de inferioribus personis, quinque solidis," arts. 1, 2, and 3, of tit. 26, of the law of the Burgundians.

f "Establishment of the French Monarchy," vol. 3, book VI. chaps. iv. and v.

g Ibid. vol. 3, chap. v. pp. 319 and 320.

h Ibid. vol. 3, book VI. chap. iv. pp. 307 and 308.

i Ibid. p. 309, and in the following chapter, pp. 319 and 320.

j See the 28th book of this work, chap. 28; and the 31st book, chap. 8.

k "Itaque colonia convenit et ita bannivimus, ut unusquisque judex, criminosum latronem ut audierit, ad casam suam ambulet et ipsum ligare faciat; ita ut si Francus fuerit, ad nostram præsentiam dirigatur; et si debilior persona fuerit, in loco pendatur."—Capitulary, of Baluzius's edition, tom. i. p. 19.

debilior persona does not signify a bondman, but a person of a superior condition to a bondman. Upon this supposition, *Francus* cannot mean a freeman, but a powerful man; and this word is taken here in that acceptation, because among the Franks there were always men who had greater power than others in the state, and it was more difficult for the judge or count to chastise them. This construction agrees very well with many Capitularies *l* where we find the cases in which the criminals were to be carried before the king, and those in which it was otherwise.

It is mentioned in the "Life of Louis the Debonnaire," *m* written by Tegan, that the bishops were the principal cause of the humiliation of that Emperor, especially those who had been bondmen and such as were born among the barbarians. Tegan thus addresses Hebo, whom this prince had drawn from the state of servitude, and made Archbishop of Rheims: "What recompense did the Emperor receive from you for so many benefits? He made you a freeman, but did not ennoble you, because he could not give you nobility after having given you your liberty." *n*

This passage which proves so strongly the two orders of citizens does not at all confound the Abbé du Bos. He answers thus: *o* "The meaning of this passage is not that Louis the Debonnaire, was incapable of introducing Hebo into the order of the nobility. Hebo, as Archbishop of Rheims, must have been of the first order, superior to that of the nobility." I leave the reader to judge whether this be not the meaning of that passage; I leave him to judge whether there be any question here concerning a precedence of the clergy over the nobility. "This passage proves only," continues the same writer, *p* "that the free-born subjects were qualified as noblemen; in the common acceptation, noblemen and men who are free-born have for this long time signified the same thing." What! because some of our burghers have lately assumed the quality of noblemen, shall a passage of the "Life of Louis the Debonnaire" be applied to this sort of people? "And, perhaps," continues he

l See the 29th book of this work, chap. 18; and the 31st book, chap. 8.

m Chaps. xliii. and xliv.

n "O qualem remunerationem reddidisti ei! fecit te liberum, non nobilem, quod impossibile est post libertatem." —Ibid.

o "Establishment of the French Monarchy," vol. 3, book VI. chap. iv. p. 316.

p Ibid. p. 316.

still,[q] "Hebo had not been a bondman among the Franks, but among the Saxons, or some other German nation, where the people were divided into several orders." Then, because of the Abbé du Bos's "perhaps," there must have been no nobility among the nation of the Franks. But he never applied a "perhaps" so badly. We have seen that Tegan distinguishes the bishops,[r] who had opposed Louis the Debonnaire, some of whom had been bondmen, and others of a barbarous nation. Hebo belonged to the former and not to the latter. Besides, I do not see how a bondman, such as Hebo, can be said to have been a Saxon or a German; a bondman has no family, and consequently no nation. Louis the Debonnaire manumitted Hebo; and as bondmen after their manumission embraced the law of their master, Hebo had become a Frank, and not a Saxon or German.

I have been hitherto acting offensively; it is now time to defend myself. It will be objected to me, that, indeed, the body of the antrustios formed a distinct order in the state from that of the freemen; but as the fiefs were at first precarious, and afterwards for life, this could not form a nobleness of descent, since the privileges were not annexed to an hereditary fief. This is the objection which induced M. de Valois to think that there was only one order of citizens among the Franks; an opinion which the Abbé du Bos has borrowed of him, and which he has absolutely spoiled with so many bad arguments. Be that as it may, it is not the Abbé du Bos that could make this objection. For after having given three orders of Roman nobility, and the quality of the king's guest for the first, he could not pretend to say that this title was a greater mark of a noble descent than that of antrustio. But I must give a direct answer. The antrustios or trusty men were not such because they were possessed of a fief, but that they had a fief given them because they were antrustios or trusty men. The reader may please to recollect what has been said in the beginning of this book. They had not at that time, as they had afterwards, the same fief: but if they had not that they had another, because the fiefs were given at their birth, and because

[q] "Establishment of the French Monarchy," vol. 3, book VI. chap. IV. p. 316.

[r] "Omnes episcopi molesti fuerunt Ludovico, et maxime ii quos e servili conditione honoratos habebat, cum his qui ex barbaris nationibus ad hoc fastigium perducti sunt."—"De gestis Ludovici Pii," cap. xliii. and xliv.

they were often granted in the assemblies of the nation, and, in fine, because as it was the interest of the nobility to receive them it was likewise the king's interest to grant them. These families were distinguished by their dignity of trusty men, and by the privilege of being qualified to swear allegiance for a fief. In the following book[s] I shall demonstrate how from the circumstances of the time there were freemen who were permitted to enjoy this great privilege, and consequently to enter into the order of nobility. This was not the case at the time of Gontram, and his nephew Childebert; but so it was at the time of Charlemagne. But though in that prince's reign the freemen were not incapable of possessing fiefs, yet it appears, by the above-cited passage of Tegan, that the emancipated serfs were absolutely excluded. Will the Abbé du Bos, who carries us to Turkey to give us an idea of the ancient French nobility;[t] will he, I say, pretend that they ever complained among the Turks of the elevation of people of low birth to the honors and dignities of the state, as they complained under Louis the Debonnaire and Charles the Bald? There was no complaint of that kind under Charlemagne, because this prince always distinguished the ancient from the new families; which Louis the Debonnaire and Charles the Bald did not.

The public should not forget the obligation it owes to the Abbé du Bos for several excellent performances. It is by these works, and not by his history of the establishment of the French monarchy, we ought to judge of his merit. He committed very great mistakes, because he had more in view the Count of Boulainvilliers's work than his own subject.

From all these strictures I shall draw only one reflection: if so great a man was mistaken how cautiously ought I to tread?

[s] Chap. 23.

[t] "Establishment of the French Monarchy," vol. 3, book VI. chap. iv. p. 302.

BOOK XXXI

THEORY OF THE FEUDAL LAWS AMONG THE FRANKS, IN THE RELATION THEY BEAR TO THE REVOLUTIONS OF THEIR MONARCHY

I.—*Changes in the Offices and in the Fiefs*

THE counts at first were sent into their districts only for a year; but they soon purchased the continuation of their offices. Of this we have an example in the reign of Clovis's grandchildren. A person named Peonius was count in the city of Auxerre;[a] he sent his son Mummolus with money to Gontram, to prevail upon him to continue him in his employment; the son gave the money for himself, and obtained the father's place. The kings had already begun to spoil their own favors.

Though by the laws of the kingdom the fiefs were precarious, yet they were neither given nor taken away in a capricious and arbitrary manner; nay, they were generally one of the principal subjects debated in the national assemblies. It is natural, however, to imagine that corruption crept into this as well as the other case; and that the possession of the fiefs, like that of the counties, was continued for money.

I shall show in the course of this book,[b] that, independently of the grants which the princes made for a certain time, there were others in perpetuity. The court wanted to revoke the former grants; this occasioned a general discontent in the nation, and was soon followed by that famous revolution in French history, whose first epoch was the amazing spectacle of the execution of Brunehaut.

That this queen, who was daughter, sister, and mother of so many kings, a queen to this very day celebrated for public monuments worthy of a Roman ædile or proconsul, born with

a Gregory of Tours, book IV. chap. xlii. *b* Chap. 7.

an admirable genius for affairs, and endowed with qualities so long respected, should see herself of a sudden exposed to so slow, so ignominious and cruel a torture,[c] by a king whose authority was but indifferently established in the nation,[d] would appear very extraordinary, had she not incurred that nation's displeasure for some particular cause. Clotharius reproached her with the murder of ten kings; but two of them he had put to death himself; the death of some of the others was owing to chance, or to the villainy of another queen;[e] and a nation that had permitted Fredegunda to die in her bed,[f] that had even opposed the punishment of her flagitious crimes, ought to have been very different with respect to those of Brunehaut.

She was put upon a camel, and led ignominiously through the army; a certain sign that she had given great offence to those troops. Fredegarius relates, that Protarius,[g] Brunehaut's favorite, stripped the lords of their property, and filled the exchequer with the plunder; that he humbled the nobility, and that no person could be sure of continuing in any office or employment. The army conspired against him, and he was stabbed in his tent; but Brunehaut either by revenging his death, or by pursuing the same plan,[h] became every day more odious to the nation.[i]

Clotharius, ambitious of reigning alone, inflamed moreover with the most furious revenge, and sure of perishing if Brunehaut's children got the upper hand, entered into a conspiracy against himself; and whether it was owing to ignorance, or to the necessity of his circumstances, he became Brunehaut's accuser, and made a terrible example of that princess.

Warnacharius had been the very soul of the conspiracy formed against Brunehaut. Being at that time Mayor of Burgundy, he made Clotharius consent that he should not be displaced while he lived.[j] By this step the mayor could no longer

[c] Fredegarius's "Chronicle," chap. xlii.

[d] Clotharius II, son of Chilperic, and the father of Dagobert.

[e] Fredegarius's "Chronicle," chap. xlii.

[f] See Gregory of Tours, book VIII. chap. xxxi.

[g] "Sæva illi fuit contra personas iniquitas, fisco nimium tribuens, de rebus personarum ingeniose fiscum vellens implere . . . ut nullus reperiretur qui gradum quem arripuerat potuisset adsumere."—Fredeg. "Chron." cap. xxvii., in the year 605.

[h] Ibid. cap. xxviii., in the year 607.

[i] Ibid. cap. xli., in the year 613. "Burgundiæ Farones, tam episcopi quam cæteri Leudes, timentes Brunechildem et odium in eam habentes, consilium inientes," etc.

[j] Ibid. cap. xli., in the year 613. "Sacramento a Clotharío accepto ne unquam vitæ suæ temporibus degradaretur."

be in the same case as the French lords before that period; and this authority began to render itself independent of the regal dignity.

It was Brunehaut's unhappy regency which had exasperated the nation. So long as the laws subsisted in their full force, no one could grumble at having been deprived of a fief, since the law did not bestow it upon him in perpetuity. But when fiefs came to be acquired by avarice, by bad practices and corruption, they complained of being divested, by irregular means, of things that had been irregularly acquired. Perhaps if the public good had been the motive of the revocation of those grants, nothing would have been said; but they pretended a regard for order while they were openly abetting the principles of corruption; the fiscal rights were claimed in order to lavish the public treasure; and grants were no longer the reward or the encouragement of services. Brunehaut, from a corrupt spirit, wanted to reform the abuses of the ancient corruption. Her caprices were not owing to weakness, the vassals and the great officers, thinking themselves in danger, prevented their own by her ruin.

We are far from having all the records of the transactions of those days; and the writers of chronicles, who understood very nearly as much of the history of their time as our peasants know of ours, are extremely barren. Yet we have a constitution of Clotharius, given in the Council of Paris,[k] for the reformation of abuses,[l] which shows that this prince put a stop to the complaints that had occasioned the revolution. On the one hand, he confirms all the grants that had been made or confirmed by the kings his predecessors;[m] and on the other, he ordains that whatever had been taken from his vassals should be restored to them.[n]

This was not the only concession the king made in that council; he enjoined that whatever had been innovated, in opposition to the privileges of the clergy, should be redressed;[o] and he moderated the influence of the court in the election of

k Some time after Brunehaut's execution, in the year 615. See Baluzius's edition of the Capitularies, p. 21.

l Quæ contra rationis ordinem acta vel ordinata sunt, ne in antea, quod avertat divinitas, contingant, disposuerimus, Christo præsule, per hujus edicti nostri tenorem generaliter emendare."—Ibid. art. 16.

m Ibid. art. 16.

n Ibid. art. 17.

o "Et quod per tempora ex hoc prætermissum est vel dehinc perpetualiter observetur."

bishops.[p] He even reformed the fiscal affairs, ordaining that all the new censuses should be abolished,[q] and that they should not levy any toll established since the deaths of Gontram, Sigebert, and Chilperic;[r] that is, he abolished whatever had been done during the regencies of Fredegonda and Brunehaut. He forbade the driving of his cattle to graze in private people's grounds;[s] and we shall presently see that the reformation was still more general, so as to extend even to civil affairs.

2.—*How the Civil Government was reformed*

Hitherto the nation had given marks of impatience and levity with regard to the choice or conduct of her masters; she had regulated their differences and obliged them to come to an agreement among themselves. But now she did what before was quite unexampled; she cast her eyes on her actual situation, examined the laws coolly, provided against their insufficiency, repressed violence, and moderated the regal power.

The bold and insolent regencies of Fredegonda and Brunehaut had less surprised than roused the nation. Fredegonda had defended her horrid cruelties, her poisonings and assassinations by a repetition of the same crimes; and had behaved in such a manner that her outrages were rather of a private than public nature. Fredegonda did more mischief: Brunehaut threatened more. In this crisis the nation was not satisfied with rectifying the feudal system; she was also determined to secure her civil government. For the latter was rather more corrupt than the former; a corruption the more dangerous as it was more inveterate, and connected rather with the abuse of manners than with that of laws.

The history of Gregory of Tours exhibits, on the one hand, a fierce and barbarous nation; and on the other, kings remarkable for the same ferocity of temper. Those princes were bloody, iniquitous, and cruel, because such was the character of the whole nation. If Christianity appeared sometimes to soften their manners, it was only by the circumstances of terror with which this religion alarms the sinner; the Church sup-

[p] "Ita ut, episcopo decedente, in loco ipsius qui a metropolitano ordinari debet cum provincialibus, a clero et populo eligatur; et, si persona condigna fuerit, per ordinationem principis ordinetur; vel certe si de palatio eligitur, per meritum personæ et doctrinæ ordinetur."—Ibid. art. 1.

[q] "Et ubicunque census novus impie additus est, emendetur."—Art. 8.

[r] Ibid. art. 9.

[s] Ibid. art. 21.

ported herself against them by the miraculous operations of her saints. The kings would not commit sacrilege, because they dreaded the punishments inflicted on that species of guilt: but, this excepted, either in the riot of passion or in the coolness of deliberation, they perpetrated the most horrid crimes and barbarities where divine vengeance did not appear so immediately to overtake the criminal. The Franks, as I have already observed, bore with cruel kings, because they were of the same disposition themselves; they were not shocked at the iniquity and extortions of their princes, because this was the national characteristic. There had been many laws established, but it was usual for the king to defeat them all, by a kind of letter called precepts,[t] which rendered them of no effect; they were somewhat similar to the rescripts of the Roman emperors; whether it be that our kings borrowed this usage from those princes, or whether it was owing to their own natural temper. We see in Gregory of Tours, that they perpetrated murder in cool blood, and put the accused to death unheard; how they gave precepts for illicit marriages;[u] for transferring successions; for depriving relatives of their right: and, in fine, marrying consecrated virgins. They did not, indeed, assume the whole legislative power, but they dispensed with the execution of the laws.

Clotharius's constitution redressed all these grievances: no one could any longer be condemned without being heard:[v] relatives were made to succeed, according to the order established by law;[w] all precepts for marrying religious women were declared null;[x] and those who had obtained and made use of them were severely punished. We might know perhaps more exactly his determinations with regard to these precepts, if the thirteenth and the next two articles of this decree had not been lost through the injury of time. We have only the first words of this thirteenth article, ordaining that the precepts shall be observed, which cannot be understood of those he had just abolished by the same law. We have another constitution

t They were orders which the king sent to the judges to do or to tolerate things contrary to law.

u See Gregory of Tours, book IV. p. 227. Both our history and the charters are full of this; and the extent of these abuses appears especially in Clotharius's constitution, inserted in the edition of the Capitularies made to reform them. Baluzius's edition, p. 7.

v Art. 22.

w Ibid. art. 6.

x Ibid.

by the same prince,[y] which is in relation to his decree, and corrects in the same manner every article of the abuses of the precepts.

True it is, that Baluzius finding this constitution without date, and without the name of the place where it was given, attributes it to Clotharius I. But I say it belongs to Clotharius II, for three reasons: 1. It says, that the king will preserve the immunities granted to the churches by his father and grandfather.[z] What immunities could the churches receive from Childeric, grandfather of Clotharius I, who was not a Christian, and who lived even before the foundation of the monarchy? But if we attribute this decree to Clotharius II we shall find his grandfather to have been this very Clotharius I who made immense donations to the Church, with a view of expiating the murder of his son Cramne, whom he had ordered to be burned, together with his wife and children.

2. The abuses redressed by this constitution were still subsisting after the death of Clotharius I and were even carried to their highest extravagance during the weak reign of Gontram, the cruel administration of Chilperic, and the execrable regencies of Fredegonda and Brunehaut. Now, can we imagine that the nation would have borne with grievances so solemnly proscribed, without complaining of their continual repetition? Can we imagine she would not have taken the same step as she did afterwards under Childeric II,[a] when, upon a repetition of the old grievances, she pressed him to ordain that law and customs in regard to judicial proceedings should be complied with as formerly? [b]

In fine, as this constitution was made to redress grievances, it cannot relate to Clotharius I, since there were no complaints of that kind in his reign, and his authority was perfectly established throughout the kingdom, especially at the time in which they place this constitution; whereas it agrees extremely well with the events that happened during the reign of Clotharius II, which produced a revolution in the political state of the kingdom. History must be illustrated by the laws, and the laws by history.

y In Baluzius's edition of the Capitularies, tom. 1. p. 7.

z In the preceding book I have made mention of these immunities, which were grants of judicial rights, and contained prohibitions to the regal judges to perform any function in the territory, and were equivalent to the erection or grant of a fief.

a He began to reign towards the year 670.

b See the "Life of St. Leger."

3.—*Authority of the Mayors of the Palace*

I noticed that Clotharius II had promised not to deprive Warnacharius of his mayor's place during life; a revolution productive of another effect. Before that time the mayor was the King's officer, but now he became the officer of the people; he was chosen before by the King, and now by the nation. Before the revolution Protarius had been made mayor by Theodoric, and Landeric by Fredegonda;[c] but after that the mayors[d] were chosen by the nation.[e]

We must not, therefore, confound, as some authors have done, these mayors of the palace with such as were possessed of this dignity before the death of Brunehaut; the King's mayors with those of the kingdom. We see by the law of the Burgundians that among them the office of mayor was not one of the most respectable in the state;[f] nor was it one of the most eminent under the first kings of the Franks.[g]

Clotharius removed the apprehensions of those who were possessed of employments and fiefs; and when, after the death of Warnacharius,[h] he asked the lords assembled at Troyes, who is it they would put in his place, they cried out they would choose no one, but suing for his favor committed themselves entirely into his hands.

Dagobert reunited the whole monarchy in the same manner as his father; the nation had a thorough confidence in him, and appointed no mayor. This prince, finding himself at liberty and elated by his victories, resumed Brunehaut's plan. But he succeeded so ill, that the vassals of Austrasia let themselves be beaten by the Sclavonians, and returned home; so that the marches of Austrasia were left a prey to the barbarians.[i]

c "Instigante Brunihault, Theodorico jubente," etc. — Fredegarius, chap. xxvii., in the year 605.

d "Gesta regum Francorum," chap. xxxvi.

e See Fredegarius's "Chronicle," chap. liv., in the year 626, and his "Anonymous Continuator," chap. ci., in the year 695, and chap. cv., in the year 715. Aimoin, book IV. chap. xv., Eginhard, "Life of Charlemagne," chap. xlviii. "Gesta regum Francorum," chap. xlv.

f See the law of the Burgundians in præfat. and the second supplement to this law, tit. 13.

g See Gregory of Tours, book IX. chap. xxxvi.

h "Eo anno, Clotarius cum proceribus et leudibus Burgundiæ Trecassinis conjungitur, cum eorum esset sollicitus si vellent jam, Warnachario discesso, alium in ejus honoris gradum sublimare: sed omnes unanimiter denegantes se nequaquam velle majorem domûs eligere, regis gratiam obnixe petentes, cum rege transegere." — Fredegarius, "Chronicle," chap. liv., in the year 626.

i "Istam victoriam quam Vinidi contra Francos meruerunt, non tantum Sclavinorum fortitudo obtinuit, quantum dementatio Austrasiorum, dum se cernebant cum Dagoberto odium incurrisse, et assidue expoliarentur."—Fredegarius's "Chronicle," chap. lxviii., in the year 630.

He determined then to make an offer to the Austrasians of resigning that country, together with a provincial treasure, to his son Sigebert, and to put the government of the kingdom and of the palace into the hands of Cunibert, Bishop of Cologne, and of the Duke Adalgisus. Fredegarius does not enter into the particulars of the conventions then made; but the King confirmed them all by charters, and Austrasia was immediately secured from danger.*j*

Dagobert, finding himself near his end, recommended his wife Nentechildis and his son Clovis to the care of Ægа. The vassals of Neustria and Burgundy chose this young prince for their king.*k* Ægа and Nentechildis had the government of the palace;*l* they restored whatever Dagobert had taken;*m* and complaints ceased in Neustria and Burgundy, as they had ceased in Austrasia.

After the death of Ægа, Queen Nentechildis engaged the lords of Burgundy to choose Floachatus for their mayor.*n* The latter despatched letters to the bishops and chief lords of the Kingdom of Burgundy, by which he promised to preserve their honors and dignities forever, that is, during life.*o* He confirmed his word by oath. This is the period at which the author of the Treatise on the Mayors of the Palace fixes the administration of the kingdom by those officers.*p*

Fredegarius, being a Burgundian, has entered into a more minute detail as to what concerns the mayors of Burgundy at the time of the revolution of which we are speaking than with regard to the mayors of Austrasia and Neustria. But the conventions made in Burgundy were, for the very same reasons, agreed to in Neustria and Austrasia.

The nation thought it safer to lodge the power in the hands of a mayor whom she chose herself, and to whom she might prescribe conditions, than in those of a king whose power was hereditary.

j "Deinceps Austrasii eorum studio limitem et regnum Francorum contra Vinidos utiliter defensasse noscuntur." —Fredegarius's "Chronicle," chap. lxxx., in the year 632.

k Fredegarius's "Chronicle," chap. lxxix., in the year 638.

l Ibid.

m Ibid. chap. lxxx., in the year 639.

n Ibid. chap. lxxxix., in the year 641.

o Ibid. cap. lxxxix. "Floachatus cunctis ducibus a regno Burgundiæ, seu et pontificibus, per epistolas etiam et sacramentis firmavit unicuique gradum honoris et dignitatem, seu et amicitiam, perpetuo conservare."

p "Deinceps a temporibus Clodovei, qui fuit filius Dagoberti inclyti regis, pater vera Theodorici, regnum Francorum decidens per majorem domus, cœpit ordinari."—"De Majoribus Domus Regiæ."

4.—*Of the Genius of the Nation in regard to the Mayors*

A government in which a nation that had an hereditary king chose a person to exercise the regal authority seems very extraordinary; but, independently of the circumstances of the times, I apprehend that the notions of the Franks in this respect were derived from a remote source.

The Franks were descended from the Germans, of whom Tacitus says [q] that in the choice of their King they were determined by his noble extraction, and in that of their leader, by his valor. This gives us an idea of the kings of the first race, and of the mayors of the palace; the former were hereditary, the latter elective.

No doubt but those princes who stood up in the national assembly and offered themselves as the conductors of a public enterprise to such as were willing to follow them, united generally in their own person both the power of the mayor and the king's authority. By the splendor of their descent they had attained the regal dignity; and their military abilities having recommended them to the command of armies, they rose to the power of mayor. By the regal dignity our first kings presided in the courts and assemblies, and enacted laws with the national consent; by the dignity of duke or leader, they undertook expeditions and commanded the armies.

In order to be acquainted with the genius of the primitive Franks in this respect, we have only to cast an eye on the conduct of Argobastes,[r] a Frank by nation, on whom Valentinian had conferred the command of the army. He confined the Emperor to his own palace; where he would suffer nobody to speak to him, concerning either civil or military affairs. Argobastes did at that time what was afterwards practised by the Pepins.

5.—*In what Manner the Mayors obtained the Command of the Armies*

So long as the kings commanded their armies in person the nation never thought of choosing a leader. Clovis and his four sons were at the head of the Franks, and led them on through

[q] "Reges ex nobilitate, duces ex virtute sumunt."—"De Moribus Germanorum."

[r] See Sulpicius Alexander, in Gregory of Tours, book II.

a series of victories. Theobald, son of Theodobert, a young, weak, and sickly prince, was the first of our kings who confined himself to his palace.[s] He refused to undertake an expedition into Italy against Narses, and had the mortification of seeing the Franks choose for themselves two chiefs, who led them against the enemy.[t] Of the four sons of Clotharius I, Gontram was the least fond of commanding his armies;[u] the other kings followed this example; and, in order to intrust the command without danger into other hands, they conferred it upon several chiefs or dukes.[v]

Innumerable were the inconveniences which thence arose; all discipline was lost, no one would any longer obey. The armies were dreadful only to their own country; they were laden with spoils before they had reached the enemy. Of these miseries we have a very lively picture in Gregory of Tours.[w] "How shall we be able to obtain a victory," said Gontram,[x] "we who do not so much as keep what our ancestors acquired? Our nation is no longer the same. . . ." Strange that it should be on the decline so early as the reign of Clovis's grandchildren!

It was, therefore, natural they should determine at last upon an only duke, a duke invested with an authority over this prodigious multitude of feudal lords and vassals, who had now become strangers to their own engagements; a duke who was to establish the military discipline, and to put himself at the head of a nation unhappily practised in making war against itself. This power was conferred on the mayors of the palace.

The original function of the mayors of the palace was the management of the king's household. They had afterwards, in conjunction with other officers, the political government of fiefs; and at length they obtained the sole disposal of them.[y] They had also the administration of military affairs, and the

[s] In the year 552.

[t] "Leutheres vero et Butilinus, tametsi id regi ipsorum minime placebat bella cum eis societatem inierunt."—Agathias, book I. Gregory of Tours, book IV. chap. ix.

[u] Gontram did not even march against Gondovald, who styled himself son of Clotharius, and claimed his share of the kingdom.

[v] Sometimes to the number of twenty. See Gregory of Tours, book V. chap. xxvi., book VIII. chap. xviii. and xxx., book X. chap. iii. Dagobert, who had no mayor in Burgundy, observed the same policy, and sent against the Gascons ten dukes and several counts who had no dukes over them.—Fredegarius's "Chronicle," chap. lxxviii., in the year 636.

[w] Gregory of Tours, book VIII. chap. xxx., and book X. chap. iii. Ibid. book VIII. chap. xxx.

[x] Ibid.

[y] See the second supplement to the law of the Burgundians, tit. 13, and Gregory of Tours, book IX. chap. xxxvi.

command of the armies; employments necessarily connected with the other two. In those days it was much more difficult to raise than to command the armies; and who but the dispenser of favors could have this authority? In this martial and independent nation, it was prudent to invite rather than to compel; prudent to give away or to promise the fiefs that should happen to be vacant by the death of the possessor; prudent in fine to reward continually, and to raise a jealousy with regard to preferences. It was, therefore, right that the person who had the superintendence of the palace should also be general of the army.

6.—*Second Epoch of the Humiliation of our Kings of the first Race*

After the execution of Brunehaut the mayors were administrators of the kingdom under the sovereigns; and though they had the conduct of the war, the kings were always at the head of the armies, while the mayor and the nation fought under their command. But the victory of Duke Pepin over Theodoric and his mayor [z] completed the degradation of our princes; [a] and that which Charles Martel obtained over Chilperic and his Mayor Rainfroy confirmed it.[b] Austrasia triumphed twice over Neustria and Burgundy; and the mayoralty of Austrasia being annexed as it were to the family of the Pepins, this mayoralty and family became greatly superior to all the rest. The conquerors were then afraid lest some person of credit should seize the king's person, in order to excite disturbances. For this reason they kept them in the royal palace as in a kind of prison, and once a year showed them to the people.[c] There they made ordinances, but these were such as were dictated by the mayor; [d] they answered ambassadors, but the mayor made the answers. This is the time mentioned by historians of the government of the mayors over the kings whom they held in subjection.[e]

[z] See the "Annals of Metz, years 687 and 688.

[a] "Illis quidem nomina regum imponens, ipse totius regni habens privilegium," etc.—"Annals of Metz," year 695.

[b] "Annals of Metz," year 719.

[c] "Sedemque illi regalem sub sua ditione concessit."—Ibid. anno 710.

[d] "Ex chronico Centulensi," lib. 2, "ut responsa quæ erat edoctus vel potius jussus, ex sua velut potestate redderet."

[e] "Annals of Metz," anno 691. "Anno principatus Pippini super Theodoricum . . . 'Annals' of Fuld, or of Laurishan, Pippinus dux Francorum obtinuit regnum Francorum per annos 27, cum regibus sibi subjectis."

The extravagant passion of the nation for Pepin's family went so far that they chose one of his grandsons, who was yet an infant, for mayor;[f] and put him over one Dagobert, that is one phantom over another.

7.—*Of the great Offices and Fiefs under the Mayors of the Palace*

The mayors of the palace were little disposed to establish the uncertain tenure of places and offices; for, indeed, they ruled only by the protection which in this respect they granted to the nobility. Hence the great offices continued to be given for life, and this usage was every day more firmly established.

But I have some particular reflections to make here in respect of fiefs: I do not question but most of them became hereditary from this time.

In the treaty of Andeli,[g] Gontram and his nephew Childebert engage to maintain the donations made to the vassals and churches by the kings their predecessors; and leave is given to the wives, daughters, and widows of kings to dispose by will, and in perpetuity, of whatever they hold of the exchequer.[h]

Marculfus wrote his formularies at the time of the mayors.[i] We find several in which the kings make donations both to the person and to his heirs:[j] and as the formularies represent the common actions of life, they prove that part of the fiefs had become hereditary towards the end of the first race. They were far from having in those days the idea of an unalienable demesne; this is a modern thing, which they knew neither in theory nor practice.

In proof hereof we shall presently produce positive facts; and if we can point out a time in which there were no longer any benefices for the army, nor any funds for its support, we must certainly conclude that the ancient benefices had been

[f] "Posthæc Theudoaldus filius ejus (Grimoaldi) parvulus, in loco ipsius, cum prædicto rege Dagoberto, majordomus palatii effectus est." The "Anonymous Continuator" of Fredegarius in the year 711, chap. civ.

[g] Cited by Gregory of Tours, book IX. See also the Edict of Clotharius II, in the year 615, art. 16.

[h] "Et si quid de agris fiscalibus vel speciebus atque præsidio pro arbitrii sui voluntate facere aut cuiquam conferre voluerint, fixa stabilitate perpetuo conservetur."

[i] See the 24th and the 34th of the first book.

[j] See the 14th formula of the first book, which is equally applicable to the fiscal estates given direct in perpetuity, or given at first as a benefice and afterwards in perpetuity: "Sicut ab illo aut a fisco nostro fuit possessa." See also the 17th formula, ibid.

alienated. The time I mean is that of Charles Martel, who founded some new fiefs, which we should carefully distinguish from those of the earliest date.

When the kings began to make grants in perpetuity, either through the corruption which crept into the government or by reason of the constitution itself, which continually obliged those princes to confer rewards, it was natural they should begin with giving the perpetuity of the fiefs, rather than of the counties. For to deprive themselves of some acres of land was no great matter; but to renounce the right of disposing of the great offices was divesting themselves of their very power.

8.—*In what Manner the Allodial Estates were changed into Fiefs*

The manner of changing an allodial estate into a fief may be seen in a formulary of Marculfus.[k] The owner of the land gave it to the king, who restored it to the donor by way of usufruct, or benefice, and then the donor nominated his heirs to the king.

In order to find out the reasons which induced them thus to change the nature of the *allodia*, I must trace the source of the ancient privileges of our nobility, a nobility which for these eleven centuries has been enveloped with dust, with blood, and with the marks of toil.

They who were seized of fiefs enjoyed very great advantages. The composition for the injuries done them was greater than that of freemen. It appears by the formularies of Marculfus that it was a privilege belonging to a king's vassal, that whoever killed him should pay a composition of six hundred sous. This privilege was established by the Salic law,[l] and by that of the Ripuarians;[m] and while these two laws ordained a composition of six hundred sous for the murder of a king's vassal, they gave but two hundred sous for the murder of a person freeborn, if he was a Frank or barbarian, or a man living under the Salic law;[n] and only a hundred for a Roman.

This was not the only privilege belonging to the king's vas-

k Book I. formulary 13.
l Tit. 44. See also tit. 66, secs. 3 and 4; and tit. 74.
m Tit. 11.
n See also the law of the Ripuarians, tit. 7; and the Salic law, tit. 44, arts. 1 and 4.

sals. We ought to know that when a man was summoned in court, and did not make his appearance nor obey the judge's orders, he was called before the king;[o] and if he persisted in his contumacy, he was excluded from the royal protection,[p] and no one was allowed to entertain him, nor even to give him a morsel of bread. Now, if he was a person of an ordinary condition, his goods were confiscated;[q] but if he was the king's vassal, they were not.[r] The first by his contumacy was deemed sufficiently convicted of the crime, the second was not; the former for the smallest crimes was obliged to undergo the trial by boiling water,[s] the latter was condemned to this trial only in the case of murder.[t] In fine, the king's vassal could not be compelled to swear in court against another vassal.[u] These privileges were continually increasing, and the Capitulary of Carloman does this honor to the king's vassals, that they should not be obliged to swear in person, but only by the mouth of their own vassals.[v] Moreover, when a person, having these honors, did not repair to the army, his punishment was to abstain from flesh-meat and wine as long as he had been absent from the service; but a freeman[w] who neglected to follow his count was fined sixty sous,[x] and was reduced to a state of servitude till he had paid it.

It is very natural, therefore, to believe that those Franks who were not the king's vassals, and much more the Romans, became fond of entering into the state of vassalage: and that they might not be deprived of their demesnes, they devised the usage of giving their *allodium* to the king, of receiving it from him afterwards as a fief, and of nominating their heirs. This usage was continued, and took place especially during the times of confusion under the second race, when every man being in want of a protector was desirous of incorporating himself with the other lords, and of entering, as it were, into the feudal monarchy, because the political no longer existed.[y]

This continued under the third race, as we find by several

o Salic law, tits. 59 and 76.
p "Extra sermonem regis." — Salic law, tits. 59 and 76.
q Salic law, tit. 59, sec. 1.
r Ibid. tit. 76, sec. 1.
s Ibid. tits. 56 and 59.
t Ibid. tit. 76, sec. 1.
u Ibid. tit. 76, sec. 2.
v "Apud vernis palatium," in the year 883, arts. 4 and 11.
w Capitulary of Charlemagne, in the year 812, arts. 1 and 3.
x "Heribannum."
y "Non infirmis reliquit hæredibus," says Lambert d'Ardres in Ducange, on the word "alodis."

charters;[z] whether they gave their *allodium*, and resumed it by the same act; or whether it was declared an *allodium*, and afterwards acknowledged as a fief. These were called fiefs of resumption.

This does not imply that those who were seized of fiefs administered them as a prudent father of a family would; for though the freemen grew desirous of being possessed of fiefs, yet they managed this sort of estates as usufructs are managed in our days. This is what induced Charlemagne, the most vigilant and considerate prince we ever had, to make a great many regulations in order to hinder the fiefs from being demeaned in favor of allodial estates.[a] It proves only that in his time most benefices were but for life, and consequently that they took more care of the freeholds than of the benefices; and yet for all that they did not choose rather to be the king's vassals than freemen. They might have reasons for disposing of some particular part of a fief, but they were not willing to be stripped of their dignity likewise.

I know, likewise, that Charlemagne laments in a certain Capitulary, that in some places there were people who gave away their fiefs in property, and redeemed them afterwards in the same manner.[b] But I do not say that they were not fonder of the property than of the usufruct; I mean only, that when they could convert an *allodium* into a fief, which was to descend to their heirs, as is the case of the formulary above mentioned, they had very great advantages in doing it.

9.—*How the Church Lands were Converted into Fiefs*

The use of the fiscal lands should have been only to serve as a donation by which the kings were to encourage the Franks to undertake new expeditions, and by which on the other hand these fiscal lands were increased. This, as I have already observed, was the spirit of the nation; but these donations took another turn. There is still extant a speech of Chilperic,[c] grandson of Clovis, in which he complains that almost all these

z See those quoted by Ducange, in the word "alodis," and those produced by Galland, in his treatise of allodial lands, p. 14, and the following.

a Second Capitulary of the year 802, art. 10; and the 7th Capitulary of the year 803, art. 3; the 1st Capitulary, "Incerti anni," art. 49; the 5th Capitulary of the year 806, art. 7; the Capitulary of the year 779, art. 29; the Capitulary of Louis the Pious, in the year 829, art. 1.

b The fifth of the year 806, art. 8.

c In Gregory of Tours, book VI. chap. xlvi.

lands had been already given away to the Church. "Our exchequer," says he, "is impoverished, and our riches are transferred to the clergy;[d] none reign now but the bishops, who live in grandeur while we are quite eclipsed."

This was the reason that the mayors, who durst not attack the lords, stripped the churches; and one of the motives alleged by Pepin for entering Neustria[e] was, his having been invited thither by the clergy, to put a stop to the encroachments of the kings, that is, of the mayors, who deprived the Church of all her possessions.

The mayors of Austrasia, that is the family of the Pepins, had behaved towards the clergy with more moderation than those of Neustria and Burgundy. This is evident from our chronicles,[f] in which we see the monks perpetually extolling the devotion and liberality of the Pepins. They themselves had been possessed of the first places in the Church. "One crow does not pull out the eyes of another;" as Chilperic said to the bishops.[g]

Pepin subdued Neustria and Burgundy; but as his pretence for destroying the mayors and kings was the grievances of the clergy, he could not strip the latter without acting inconsistently with his cause, and showing that he made a jest of the nation. However, the conquest of two great kingdoms and the destruction of the opposite party afforded him sufficient means of satisfying his generals.

Pepin made himself master of the monarchy by protecting the clergy; his son, Charles Martel, could not maintain his power but by oppressing them. This prince, finding that part of the regal and fiscal lands had been given either for life, or in perpetuity, to the nobility, and that the Church by receiving both from rich and poor had acquired a great part even of the allodial estates, he resolved to strip the clergy; and as the fiefs of the first division were no longer in being, he formed a second.[h] He took for himself and for his officers the church

[d] This is what induced him to annul the testaments made in favor of the clergy, and even the donations of his father; Gontram re-established them, and even made new donations.—Gregory of Tours, book VII. chap. vii.

[e] See the "Annals of Metz," year 689. "Excitor imprimis querelis sacerdotum et servorum Dei, qui me sæpius adierunt ut pro sublatis injuste patrimoniis," etc.

[f] See the "Annals of Metz."

[g] In Gregory of Tours.

[h] "Karolus plurima juri ecclesiastico detrahens prædia fisco sociavit, ac deinde militibus dispertivit."—"Ex Chronico Centulensi," lib. II.

lands and the churches themselves; thus he remedied an evil which differed from ordinary diseases, as its extremity rendered it the more easy to cure.

10.—*Riches of the Clergy*

So great were the donations made to the clergy that under the three races of our princes they must have several times received the full property of all the lands of the kingdom. But if our kings, the nobility, and the people found the way of giving them all their estates, they found also the method of getting them back again. The spirit of devotion established a great number of churches under the first race; but the military spirit was the cause of their being given away afterwards to the soldiery, who divided them among their children. What a number of lands must have then been taken from the clergy's *mensalia!* The kings of the second race opened their hands, and made new donations to them; but the Normans, who came afterwards, plundered and ravaged all before them, wreaking their vengeance chiefly on the priests and monks, and devoting every religious house to destruction. For they charged those ecclesiastics with the destruction of their idols, and with all the oppressive measures of Charlemagne by which they had been successively obliged to take shelter in the North. These were animosities which the space of forty or fifty years had not been able to obliterate. In this situation what losses must the clergy have sustained! There were hardly ecclesiastics left to demand the estates of which they had been deprived. There remained, therefore, for the religious piety of the third race, foundations enough to make, and lands to bestow. The opinions which were spread abroad and believed in those days would have deprived the laity of all their estates, if they had been but virtuous enough. But if the clergy were actuated by ambition, the laity were not without theirs; if dying persons gave their estates to the Church, their heirs would fain resume them. We meet with continual quarrels between the lords and the bishops, the gentlemen and the abbots; and the clergy must have been very hard pressed, since they were obliged to put themselves under the protection of certain lords, who granted them a momentary defence, and afterwards joined their oppressors.

But a better administration having been established under the third race gave the clergy leave to augment their possessions; when the Calvinists started up, and having plundered the churches, they turned all the sacred plate into specie. How could the clergy be sure of their estates, when they were not even safe in their persons? They were debating on controversial subjects while their archives were in flames. What did it avail them to demand back of an impoverished nobility those estates which were no longer in possession of the latter, but had been conveyed into other hands by different mortgages? The clergy have been long acquiring, and have often refunded, and still there is no end of their acquisitions.

II.—*State of Europe at the Time of Charles Martel*

Charles Martel, who undertook to strip the clergy, found himself in a most happy situation. He was both feared and beloved by the soldiery, he worked for them, having the pretext of his wars against the Saracens. He was hated, indeed, by the clergy, but he had no need of their assistance.[i] The Pope, to whom he was necessary, stretched out his arms to him. Everyone knows the famous embassy he received from Gregory III.[j] These two powers were strictly united, because they could not do without each other: the Pope stood in need of the Franks to assist him against the Lombards and the Greeks; Charles Martel had occasion for the Pope, to humble the Greeks, to embarrass the Lombards, to make himself more respectable at home, and to guarantee the titles which he had, and those which he or his children might take. It was impossible, therefore, for his enterprise to miscarry.

St. Eucherius, Bishop of Orleans, had a vision which frightened all the princes of that time. I shall produce on this occasion the letter written by the bishops assembled at Rheims to Louis, King of Germany, who had invaded the territories of Charles the Bald;[k] because it will give us an insight into the situation of things in those times, and the temper of the people. They say,[l] "That St. Eucherius, having been snatched up

[i] See the "Annals of Metz."

[j] "Epistolam quoque, decreto Romanorum principum, sibi prædictus præsul Gregorius miserat, quod sese populus Romanus, relicta imperatoris dominatione, ad suam defensionem et invictam clementiam convertere voluisset."—"Annals of Metz," year 741. "Eo pacto patrato, ut a partibus imperatoris recederet."—Fredegarius.

[k] Anno 858, "apud Carisiacum"; Baluzius's edition, tom. i. p. 101.

[l] Ibid. p. 109.

into heaven, saw Charles Martel tormented in the bottom of hell by order of the saints, who are to sit with Christ at the last judgment; that he had been condemned to this punishment before his time, for having stripped the Church of her possessions and thereby charged himself with the sins of all those who founded these livings; that King Pepin held a council upon this occasion, and had ordered all the church lands he could recover to be restored; that as he could get back only a part of them, because of his disputes with Vaifre, Duke of Aquitaine, he issued letters called *precaria* [m] for the remainder, and made a law that the laity should pay a tenth part of the church lands they possessed, and twelve deniers for each house; that Charlemagne did not give the church lands away; on the contrary, that he published a Capitulary, by which he engaged both for himself and for his successors never to make any such grant; that all they say is committed to writing, and that a great many of them heard the whole related by Louis the Debonnaire, the father of those two kings."

King Pepin's regulation, mentioned by the bishops, was made in the Council held at Leptines.[n] The Church found this advantage in it, that such as had received those lands held them no longer but in a precarious manner; and, moreover, that she received the tithe or tenth part, and twelve deniers for every house that had belonged to her. But this was only a palliative, and did not remove the disorder.

Nay, it met with opposition, and Pepin was obliged to make another Capitulary,[o] in which he enjoins those who held any of those benefices to pay this tithe and duty, and even to keep up the houses belonging to the bishopric or monastery, under the penalty of forfeiting those possessions. Charlemagne renewed the regulations of Pepin.[p]

That part of the same letter which says that Charlemagne promised both for himself and for his successors never to divide

[m] "Precaria, quod precibus utendum conceditur," says Cujus, in his notes upon the first "Book of Fiefs." I find in a diploma of King Pepin, dated the third year of his reign, that this prince was not the first who established these "precaria"; he cites one made by the Mayor Ebroin, and continued after his time. See the diploma of the king, in the 5th tome of the "Historians of France" by the Benedictins, art. 6.

[n] In the year 743, see the 5th book of the Capitularies, art. 3, Baluzius's edition, p. 825.

[o] That of Metz, in the year 736, art. 4.

[p] See his Capitulary, in the year 803, given at Worms; Baluzius's edition, p. 411, where he regulates the precarious contract, and that of Frankfort, in the year 794, p. 267, art 24, in relation to the repairing of the houses; and that of the year 800, p. 330.

again the church lands among the soldiery is agreeable to the Capitulary of this prince, given at Aix-la-Chapelle in the year 803, with a view of removing the apprehensions of the clergy upon this subject. But the donations already made were still in force.[q] The bishops very justly add, that Louis the Debonnaire followed the example of Charlemagne, and did not give away the church lands to the soldiery.

And yet the old abuses were carried to such a pitch, that the laity under the children of Louis the Debonnaire preferred ecclesiastics to benefices, or turned them out of their livings[r] without the consent of the bishops. The benefices were divided among the next heirs,[s] and when they were held in an indecent manner the bishops had no other remedy left than to remove the relics.[t]

By the Capitulary of Compiègne[u] it is enacted that the king's commissary shall have a right to visit every monastery, together with the bishop, by the consent and in presence of the person who holds it;[v] and this shows that the abuse was general.

Not that there were laws wanting for the restitution of the church-lands. The Pope having reprimanded the bishops for their neglect in regard to the re-establishment of the monasteries, they wrote to Charles the Bald, that they were not affected by this reproach, because they were not culpable;[w] and they reminded him of what had been promised, resolved, and decreed in so many national assemblies. In point of fact they quoted nine.

Still they went on disputing; till the Normans came and made them all agree.

12.—*Establishment of the Tithes*

The regulations made under King Pepin had given the Church rather hopes of relief than effectually relieved her; and as Charles Martel found all the landed estates of the kingdom

q As appears by the preceding note, and by the Capitulary of Pepin, King of Italy, where it says that the King would give the monasteries in fief to those who would swear allegiance for fiefs: it is added to the law of the Lombards, book III, tit. 1, sec. 30; and to the Salic laws, Collection of Pepin's laws in Echard, p. 195, tit. 26, art. 4.

r See the constitution of Lotharius I. in the law of the Lombards, book III. law 1, sec. 43.

s Ibid. sec. 44.

t Ibid.

u Given the 28th year of the reign of Charles the Bald, in the year 868. Baluzius's edition, p. 203.

v "Cum consilio et consensu ipsius qui locum retinet."

w "Concilium apud Bonoilum," the 16th year of Charles the Bald, in the year 856, Baluzius's edition, p. 78.

in the hands of the clergy, Charlemagne found all the church lands in the hands of the soldiery. The latter could not be compelled to restore a voluntary donation; and the circumstances of that time rendered the thing still more impracticable than it seemed to be of its own nature. On the other hand, Christianity ought not to have been lost for want of ministers, churches, and instruction.[x]

This was the reason of Charlemagne's establishing the tithes,[y] a new kind of property which had this advantage in favor of the clergy, that as they were given particularly to the Church, it was easier in process of time to know when they were usurped.

Some have attempted to make this institution of a still remoter date, but the authorities they produce seem rather, I think, to prove the contrary. The constitution of Clotharius says[z] only, that they shall not raise certain tithes on church-lands; [a] so far then was the Church from exacting tithes at that time, that its whole pretension was to be exempted from paying them. The second council of Mâcon,[b] which was held in 585, and ordains the payment of tithes, says, indeed, that they were paid in ancient times, but it says also that the custom of paying them was then abolished.

No one questions but that the clergy opened the Bible before Charlemagne's time, and preached the gifts and offerings of Leviticus. But I say, that before that prince's reign, though the tithes might have been preached, they were never established.

I noticed that the regulations made under King Pepin had subjected those who were seized of church lands in fief to the payment of tithes, and to the repairing of the churches. It was

[x] In the civil wars which broke out at the time of Charles Martel, the lands belonging to the Church of Rheims were given away to laymen; "the clergy were left to shift as well as they could," says the "Life of Remigius," Surius, tom. i. p. 279.

[y] Law of the Lombards, book III. tit. 3, secs. 1 and 2.

[z] It is that on which I have descanted in the 4th chapter of this book, and which is to be found in Baluzius's edition of the Capitularies, tom. i. art. 11, p. 9.

[a] "Agraria et pascuaria, vel decimas porcorum ecclesiæ concedimus, ita ut aetor aut decimator in rebus ecclesiæ nullus ascedat." The Capitulary of Charlemagne in the year 800, Baluzius's edition, p. 336, explains extremely well what is meant by that sort of tithe from which the Church is exempted by Clotharius; it was the tithe of the swine which were put into the king's forests to fatten; and Charlemagne enjoins his judges to pay it, as well as other people, in order to set an example: it is plain that this was a right of seigniory or economy.

[b] Canone 5, ex tomo 1, "conciliorum antiquorum Galliæ opera Jacobi Sirmundi."

a great deal to induce by a law, whose equity could not be disputed, the principal men of the nation to set the example.

Charlemagne did more; and we find by the Capitulary *de Villis* [c] that he obliged his own demesnes to the payment of the tithes; this was a still more striking example.

But the commonalty are rarely influenced by example to sacrifice their interests. The Synod of Frankfort furnished them with a more cogent motive to pay the tithes.[d] A Capitulary was made in that Synod, wherein it is said, that in the last famine the spikes of corn were found to contain no seed,[e] the infernal spirits having devoured it all, and that those spirits had been heard to reproach them with not having paid the tithes; in consequence of which it was ordained that all those who were seized of church lands should pay the tithes; and the next consequence was that the obligation extended to all.

Charlemagne's project did not succeed at first, for it seemed too heavy a burden.[f] The payment of the tithes among the Jews was connected with the plan of the foundation of their republic; but here it was a burden quite independent of the other charges of the establishment of the monarchy. We find by the regulations added to the law of the Lombards [g] the difficulty there was in causing the tithes to be accepted by the civil laws; and as for the opposition they met with before they were admitted by the ecclesiastic laws, we may easily judge of it from the different canons of the councils.

The people consented at length to pay the tithes, upon condition that they might have the power of redeeming them. This the constitution of Louis the Debonnaire,[h] and that of the Emperor Lotharius, his son, would not allow.[i]

The laws of Charlemagne, in regard to the establishment of tithes, were a work of necessity, not of superstition—a work, in short, in which religion only was concerned.

His famous division of the tithes into four parts, for the re-

c Art. 6, Baluzius's edition, p. 332. It was given in the year 800.

d Held under Charlemagne, in the year 794.

e "Experimento enim didicimus in anno quo illa valida fames irrepsit, ebullire vacuas annonas a demonibus devoratas, et voces exprobrationis auditas," etc.—Baluzius's edition, p. 167, art. 23.

f See among the rest the Capitulary of Louis the Debonnaire, in the year 829, Baluzius's edition, p. 663; against those who, to avoid paying tithes neglected to cultivate the lands, etc., art. 5. "Nonis quidem et decimis, unde et genitor noster et nos frequenter in diversis placitis admonitionem fecimus."

g Among others, that of Lotharius, book III. tit. 3, chap. vi.

h In the year 829, art. 7, in Baluzius, tom i p. 663.

i In the law of the Lombards, book III. tit. 3, sec. 8.

pairing of the churches, for the poor, for the bishop, and for the clergy, manifestly proves that he wished to give the Church that fixed and permanent status which she had lost.

His will shows that he was desirous of repairing the mischief done by his grandfather, Charles Martel.*j* He made three equal shares of his movable goods; two of these he would have divided each into one-and-twenty parts, for the one-and-twenty metropolitan sees of his empire; each part was to be subdivided between the metropolitan and the dependent bishoprics. The remaining third he distributed into four parts; one he gave to his children and grandchildren, another was added to the two-thirds already bequeathed, and the other two were assigned to charitable uses. It seems as if he looked upon the immense donation he was making to the Church less as a religious act than as a political distribution.

13.—*Of the Election of Bishops and Abbots*

As the Church had grown poor, the kings resigned the right of nominating to bishoprics and other ecclesiastic benefices.*k* The princes gave themselves less trouble about the ecclesiastic ministers; and the candidates were less solicitous in applying to their authorities. Thus the Church received a kind of compensation for the possessions she had lost.

Hence, if Louis the Debonnaire left the people of Rome in possession of the right of choosing their popes, it was owing to the general spirit that prevailed in his time;*l* he behaved in the same manner to the see of Rome as to other bishoprics.

14.—*Of the Fiefs of Charles Martel*

I shall not pretend to determine whether Charles Martel, in giving the church lands in fief, made a grant of them for life or in perpetuity. All I know is, that under Charlemagne*m* and Lotharius I*n* there were possessions of that kind which descended to the next heirs, and were divided among them.

j It is a kind of codicil produced by Eginhard, and different from the will itself, which we find in Goldastus and Baluzius.

k See the Capitulary of Charlemagne in the year 803, art. 2, Baluzius's edition, p. 379; and the Edict of Louis the Debonnaire, in the year 834, in Goldast, "Constit. Impérial," tom. i.

l This is mentioned in the famous canon, "ego Ludovicus," which is a palpable forgery; it is Baluzius's edition, p. 591, in the year 817.

m As appears by his capitulary, in the year 801, art. 17, in Baluzius, tom. i. p. 360.

n See his constitution, inserted in the code of the Lombards, book III. tit. 1, sec. 44.

I find, moreover, that one part of them was given as *allodia*, and the other as fiefs.[o]

I noticed that the proprietors of the *allodia* were subject to service all the same as the possessors of the fiefs. This, without doubt, was partly the reason that Charles Martel made grants of allodial lands as well as of fiefs.

15.—*The same Subject continued*

We must observe, that the fiefs having been changed into church lands, and these again into fiefs, they borrowed something of each other. Thus the church lands had the privileges of fiefs, and these had the privileges of church lands. Such were the honorary rights of churches, which began at that time.[p] And as those rights have ever been annexed to the judiciary power, in preference to what is still called the fief, it follows that the patrimonial jurisdictions were established at the same time as those very rights.

16.—*Confusion of the Royalty and Mayoralty. The Second Race*

The connection of my subject has made me invert the order of time, so as to speak of Charlemagne before I had mentioned the famous epoch of the translation of the crown to the Carlovingians under King Pepin; a revolution which, contrary to the nature of ordinary events, is more remarked perhaps in our days than when it happened.

The kings had no authority; they had only an empty name. The regal title was hereditary, and that of mayor elective. Though it was latterly in the power of the mayors to place any of the Merovingians on the throne, they had not yet taken a king of another family; and the ancient law which fixed the crown in a particular family was not yet erased from the hearts of the Franks. The king's person was almost unknown in the monarchy; but royalty was not. Pepin, son of Charles

o See the above constitution, and the Capitulary of Charles the Bald, in the year 846, chap. xx. "in Villa Sparnaco," Baluzius's edition, tom. ii. p. 31, and that of the year 853, chaps. iii. and v., in the Synod of Soissons, Baluzius's edition, tom. ii. p. 54; and that of the year 854, "apud Attiniacum," chap. x. Baluzius's edition, tom. ii. p. 70. See also the first Capitulary of Charlemagne, "incerti anni," arts. 49 and 56. Baluzius's edition, tom. i. p. 519.

p See the Capitularies, book v. art. 44, and the Edict of Pistes in the year 869, arts. 8 and 9, where we find the honorary rights of the lords established, in the same manner as they are at this very day.

Martel, thought it would be proper to confound those two titles, a confusion which would leave it a moot point whether the new royalty was hereditary or not; and this was sufficient for him who to the regal dignity had joined a great power. The mayor's authority was then blended with that of the king. In the mixture of these two authorities a kind of reconciliation was made; the mayor had been elective, and the king hereditary; the crown at the beginning of the second race was elective, because the people chose; it was hereditary, because they always chose in the same family.[q]

Father le Cointe, in spite of the authority of all ancient records,[r] denies that the Pope authorized this great change; and one of his reasons is that he would have committed an injustice.[s] A fine thing to see a historian judge of that which men have done by that which they ought to have done; by this mode of reasoning we should have no more history.

Be that as it may, it is very certain that immediately after Duke Pepin's victory, the Merovingians ceased to be the reigning family. When his grandson, Pepin, was crowned king, it was only one ceremony more, and one phantom less; he acquired nothing thereby but the royal ornaments; there was no change made in the nation.

This I have said in order to fix the moment of the revolution, that we may not be mistaken in looking upon that as a revolution which was only a consequence of it.

When Hugh Capet was crowned king at the beginning of the third race, there was a much greater change, because the kingdom passed from a state of anarchy to some kind of government; but when Pepin took the crown there was only a transition from one government to another, which was identical.

When Pepin was crowned king there was only a change of name; but when Hugh Capet was crowned there was a change in the nature of the thing, because by uniting a great fief to the crown the anarchy ceased.

q See the will of Charlemagne, and the division which Louis the Debonnaire made to his children in the assembly of the states held at Quierzy, related by Goldast, "quem populus eligere velit, ut patri suo succedat in regni hæreditate."

r The anonymous "Chronicle" in the year 752; and "Chronic. Centul." in the year 754.

s "Fabella quæ post Pippini mortem excogitata est, æquitati ac sanctitati Zachariæ papæ plurimum adversatur." —"Ecclesiastic Annals of the French," tom. ii. p. 319.

When Pepin was crowned the title of king was united to the highest office; when Hugh Capet was crowned it was annexed to the greatest fief.

17.—*A particular Circumstance in the Election of the Kings of the Second Race*

We find by the formulary of Pepin's coronation that Charles and Carloman were also anointed,[t] and blessed, and that the French nobility bound themselves, on pain of interdiction and excommunication, never to choose a prince of another family.[u]

It appears by the wills of Charlemagne and Louis the Debonnaire, that the Franks made a choice among the king's children, which agrees with the above-mentioned clause. And when the empire was transferred from Charlemagne's family, the election, which before had been restricted and conditional, became pure and simple, so that the ancient constitution was departed from.

Pepin, perceiving himself near his end, assembled the lords, both temporal and spiritual, at St. Denis, and divided his kingdom between his two sons, Charles and Carloman.[v] We have not the acts of this assembly, but we find what was there transacted in the author of the ancient historical collection, published by Canisius, and in the writer of the Annals of Metz,[w] according to the observation of Baluzius.[x] Here I meet with two things in some measure contradictory; that he made this division with the consent of the nobility, and afterwards that he made it by his paternal authority. This proves what I said, that the people's right in the second race was to choose in the same family; it was, properly speaking, rather a right of exclusion than that of election.

This kind of elective right is confirmed by the records of the second race. Such is this Capitulary of the division of the empire made by Charlemagne among his three children, in which, after settling their shares, he says,[y] "That if one of the three brothers happens to have a son, such as the people shall

t Vol. 5th of the "Historians of France" by the Benedictins, p. 9.

u "Ut unquam de alterius lumbis regem in ævo præsumant eligere sed ex ipsorum." Vol. 5th of the "Historians of France," p. 10.

v In the year 768.

w Tom. ii. "lectionis antiquæ."

x Edition of the Capitularies, tom. i. p. 188.

y In the 1st Capitulary of the year 806. Baluzius's edition, p. 439, art. 5.

be willing to choose as a fit person to succeed to his father's kingdom, his uncles shall consent to it."

This same regulation is to be met with in the partition which Louis the Debonnaire made among his three children, Pepin, Louis, and Charles, in the year 837, at the assembly of Aix-la-Chapelle;[z] and likewise in another partition, made twenty years before, by the same Emperor, in favor of Lotharius, Pepin, and Louis.[a] We may likewise see the oath which Louis the Stammerer took at Compiègne at his coronation: "I, Louis, by the divine mercy, and the people's election, appointed king, do promise . . ."[b] What I say is confirmed by the acts of the Council of Valence, held in the year 890, for the election of Louis, son of Boson, to the kingdom of Arles.[c] Louis was there elected, and the principal reason they gave for choosing him is that he was of the imperial family,[d] that Charles the Fat had conferred upon him the dignity of king, and that the Emperor Arnold had invested him by the sceptre, and by the ministry of his ambassadors. The kingdom of Arles, like the other dismembered or dependent kingdoms of Charlemagne, was elective and hereditary.

18.—*Charlemagne*

Charlemagne's intention was to restrain the power of the nobility within proper bounds, and to hinder them from oppressing the freemen and the clergy. He balanced the several orders of the state, and remained perfect master of them all. The whole was united by the strength of his genius. He led the nobility continually from one expedition to another, giving them no time to form conspiracies, but employing them entirely in the execution of his designs. The empire was supported by the greatness of its chief; the prince was great, but the man was greater. The kings, his children, were his first subjects, the instruments of his power and patterns of obedience. He made admirable laws; and, what is more, he took care to see them executed. His genius diffused itself through

z In Goldast, "Constit. Impérial," tom. ii. p. 19.

a Baluzius's edition, p. 574, art. 14. "Si vero aliquis illorum decedens legitimos filios reliquerit, non inter eos potestas ipsa dividatur, sed potius populus pariter conveniens, unum ex iis quem dominus voluerit eligat, et hunc senior frater in loco fratris et filii suscipiat."

b Capitulary of the year 877. Baluzius's edition, p. 272.

c In Father Labbe's "Councils," tom. ix. col. 424; and in Dumont's "Corp. Diplomat." tom. ii. art. 36.

d By the mother's side.

every part of the empire. We find in this prince's laws a comprehensive spirit of foresight, and a certain force which carries all before it. All pretexts for evading the duties are removed, neglects are corrected, abuses reformed or prevented.[e] He knew how to punish, but he understood much better how to pardon. He was great in his designs, and simple in the execution of them. No prince ever possessed in a higher degree the art of performing the greatest things with ease, and the most difficult with expedition. He was continually visiting the several parts of his vast empire, and made them feel the weight of his hand wherever it fell. New difficulties sprang up on every side, and on every side he removed them. Never prince had more resolution in facing dangers; never prince knew better how to avoid them. He mocked all manner of perils, and particularly those to which great conquerors are generally subject, namely, conspiracies. This wonderful prince was extremely moderate, of a very mild character, plain and simple in his behavior. He loved to converse freely with the lords of his court. He indulged, perhaps, too much his passion for the fair sex; a failing, however, which in a prince who always governed by himself, and who spent his life in a continual series of toils, may merit some allowance. He was wonderfully exact in his expenses, administering his demesnes with prudence, attention, and economy. A father might learn from his laws how to govern his family; and we find in his Capitularies the pure and sacred source whence he derived his riches.[f] I shall add only one word more: he gave orders that the eggs in the bartons on his demesnes, and the superfluous garden-stuff, should be sold;[g] he distributed among his people all the riches of the Lombards, and the immense treasures of those Huns that had plundered the whole world.

19.—*The same Subject continued*

Charlemagne and his immediate successors were afraid lest those whom they placed in distant parts should be inclined to revolt, and thought they should find more docility among the

e See his 3d Capitulary of the year 811, p. 496, arts. 1, 2, 3, 4, 5, 6, 7, and 8; and the 1st Capitulary of the year 812, p. 499, art. 1; and the Capitulary of the year 812, p. 494, arts. 9 and 11, etc.

f See the "Capitulary de Villis" in the year 800; his 2d Capitulary of the year 813, arts. 6 and 19; and the 5th book of the Capitularies, art. 303.

g "Capitul. de Villis," art. 39. See this whole Capitulary, which is a masterpiece of prudence, good administration, and economy.

clergy. For this reason they erected a great number of bishoprics in Germany and endowed them with very large fiefs.[h] It appears by some charters that the clauses containing the prerogatives of those fiefs were not different from such as were commonly inserted in those grants,[i] though at present we find the principal ecclesiastics of Germany invested with a sovereign power. Be that as it may, these were some of the contrivances they used against the Saxons. That which they could not expect from the indolence or supineness of vassals they thought they ought to expect from the sedulous attention of a bishop. Besides, a vassal of that kind, far from making use of the conquered people against them, would rather stand in need of their assistance to support themselves against their own people.

20.—*Louis the Debonnaire*

When Augustus Cæsar was in Egypt he ordered Alexander's tomb to be opened; and upon their asking him whether he was willing they should open the tombs of the Ptolemies, he made answer that he wanted to see the king, and not the dead. Thus, in the history of the second race, we are continually looking for Pepin and Charlemagne; we want to see the kings, and not the dead.

A prince who was the sport of his passions, and a dupe even to his virtues; a prince who never understood rightly either his own strength or weakness; a prince who was incapable of making himself either feared or beloved; a prince, in fine, who with few vices in his heart had all manner of defects in his understanding, took the reins of the empire into his hands which had been held by Charlemagne.

At a time when the whole world is in tears for the death of his father, at a time of surprise and alarm, when the subjects of that extensive empire all call upon Charles and find him no more; at a time when he is advancing with all expedition to take possession of his father's throne, he sends some trusty officers before him in order to seize the persons of those who had contributed to the irregular conduct of his sisters. This step was productive

h See among others the foundation of the archbishopric of Bremen, in the Capitulary of the year 789. Baluzius's edition, p. 245.

i For instance, the prohibition to the king's judges against entering upon the territory to demand the freda, and other duties. I have said a good deal concerning this in the preceding book.

of the most terrible catastrophes.[j] It was imprudent and precipitate. He began with punishing domestic crimes before he reached the palace; and with alienating the minds of his subjects before he ascended the throne.

His nephew, Bernard, King of Italy, having come to implore his clemency, he ordered his eyes to be put out, which proved the cause of that prince's death a few days after, and created Louis a great many enemies. His apprehension of the consequence induced him to shut his brothers up in a monastery; by which means the number of his enemies increased. These two last transactions were afterwards laid to his charge in a judicial manner,[k] and his accusers did not fail to tell him that he had violated his oath and the solemn promises which he had made to his father on the day of his coronation.[l]

After the death of the Empress Hermengarde, by whom he had three children, he married Judith, and had a son by that princess; but soon mixing all the indulgence of an old husband, with all the weakness of an old king, he flung his family into a disorder which was followed by the downfall of the monarchy.

He was continually altering the partitions he had made among his children. And yet these partitions had been confirmed each in their turn by his own oath, and by those of his children and the nobility. This was as if he wanted to try the fidelity of his subjects; it was endeavoring by confusion, scruples, and equivocation, to puzzle their obedience; it was confounding the different rights of those princes, and rendering their titles dubious, especially at a time when there were but few fortresses, and when the principal bulwark of authority was the fealty sworn and accepted.

The Emperor's children, in order to preserve their shares, courted the clergy, and granted them privileges till then unheard. These privileges were specious; and the clergy in return were made to warrant the revolution in favor of those princes. Agobard[m] represents to Louis the Debonnaire as having sent Lotharius to Rome, in order to have him declared emperor; and that he had made a division of his dominions among his children,

[j] The anonymous author of the "Life of Louis the Debonnaire," in Duchesne's Collection, tom. ii. p. 295.

[k] See his trial and the circumstances of his deposition, in Duchesne's Collection, tom. ii. p. 133.

[l] He directed him to show unlimited clemency (indeficientem miserlcordiam) to his sisters, his brothers, and his nephews. Tegan, in the Collection of Duchesne, tom. ii. p. 276.

[m] See his letters.

after having consulted heaven by three days' fasting and praying. What defence could such a weak prince make against the attack of superstition? It is easy to perceive the shock which the supreme authority must have twice received from his imprisonment, and from his public penance; they would fain degrade the king, and they degraded the regal dignity.

We find difficulty at first in conceiving how a prince who was possessed of several good qualities, who had some knowledge, who had a natural disposition to virtue, and who, in short, was the son of Charlemagne, could have such a number of enemies,[n] so impetuous and implacable as even to insult him in his humiliation and to be determined upon his ruin; and, indeed, they would have utterly completed it, if his children, who in the main were more honest than they, had been steady in their design, and could have agreed among themselves.

21.—*The same Subject continued*

The strength and solidity for which the kingdom was imdebted to Charlemagne still subsisted under Louis the Debonnaire, in such a degree as enabled the state to support its grandeur and to command respect from foreign nations. The prince's understanding was weak, but the nation was warlike. His authority declined at home, though there seemed to be no diminution of power abroad.

Charles Martel, Pepin, and Charlemagne were in succession rulers of the monarchy. The first flattered the avarice of the soldiers: the other two that of the clergy. Louis the Debonnaire, displeased both.

In the French constitution, the whole power of the state was lodged in the hands of the king, the nobility, and clergy. Charles Martel, Pepin, and Charlemagne joined sometimes their interest with one of those parties to check the other and generally with both; but Louis the Debonnaire could gain the affection of neither. He disobliged the bishops by publishing regulations which had the air of severity, because he carried things to a greater length than was agreeable to their inclination. Very good laws may be ill-timed. The bishops in those days, being

[n] See his trial and the circumstances of his deposition in Duchesne's Collection, tom. ii. p. 331. See also his life written by Tegan: "Tanto enim odio laborabat, ut tæderet eos vita ipsius," says this anonymous author in Duchesne, tom. ii. p. 307.

accustomed to take the field against the Saracens and the Saxons, had very little of the spirit of religion.[o] On the other hand, as he had no longer any confidence in the nobility, he promoted mean people,[p] turning the nobles out of their employments at court to make room for strangers and upstarts.[q] By this means the affection of the two great bodies of the nobility and clergy were alienated from their prince, the consequence of which was a total desertion.

22.—*The same Subject continued*

But what chiefly contributed to weaken the monarchy was the extravagance of this prince in alienating the crown demesnes.[r] And here it is that we ought to listen to the account of Nitard, one of our most judicious historians, a grandson of Charlemagne, strongly attached to Louis the Debonnaire, and who wrote his history by order of Charles the Bald.

He says, "that one Adelhard for some time gained such an ascendant over the Emperor, that this prince conformed to his will in everything; that at the instigation of this favorite he had granted the crown lands to everybody that asked them,[s] by which means the state was ruined."[t] Thus he did the same mischief throughout the empire, as I observed he had done in Aquitaine;[u] the former Charlemagne redressed, but the latter was past all remedy.

The state was reduced to the same debility in which Charles Martel found it upon his accession to the mayoralty; and so desperate were its circumstances that no exertion of authority was any longer capable of saving it.

The treasury was so exhausted that in the reign of Charles the Bald, no one could continue in his employment, nor be safe in his person without paying for it.[v] When they had it in their power to destroy the Normans, they took money to let them escape:[w] and the first advice which Hincmar gives to Louis the

o The anonymous author of the "Life of Louis the Debonnaire," in Duchesne's Collection, tom. ii. p. 298.

p Tegan says that what seldom happened under Charlemagne was a common practice under Louis.

q Being desirous to check the nobility, he promoted one Bernard to the place of chamberlain, by which the great lords were exasperated to the highest pitch.

r "Villas regias quæ erant sui et avi et tritavi, fidelibus suis tradidit eas in possessiones sempiternas; fecit enim hoc diu tempore."—Tegan, "de Gestis Ludovici Pii."

s "Hinc libertates, hinc publica in proprius usibus distribuere suasit."—Nitard, lib. iv. "prope finem."

t "Rempublicam penitus annullavit."—Ibid.

u See book XXX. chap. 13.

v Hincmar, let. 1, to Louis the Stammerer.

w See the fragment of the "Chronicle of the Monastery of St. Sergius of Angers," in Duchesne, tom. ii. p. 401.

Stammerer is to ask of the assembly of the nation a sufficient allowance to defray the expenses of his household.

23.—*The same Subject continued*

The clergy had reason to repent the protection they had granted to the children of Louis the Debonnaire. This prince, as I have already observed, had never given any of the church lands by precepts to the laity;[x] but it was not long before Lotharius in Italy, and Pepin in Aquitaine, quitted Charlemagne's plan, and resumed that of Charles Martel. The clergy had recourse to the Emperor against his children, but they themselves had weakened the authority to which they appealed. In Aquitaine some condescension was shown, but none in Italy.

The civil wars with which the life of Louis the Debonnaire had been embroiled were the seed of those which followed his death. The three brothers, Lotharius, Louis, and Charles endeavored each to bring over the nobility to their party and to make them their tools. To such as were willing therefore to follow them they granted church lands by precepts; so that to gain the nobility, they sacrificed the clergy.

We find in the Capitularies[y] that those princes were obliged to yield to the importunity of demands, and that what they would not often have freely granted was extorted from them: we find that the clergy thought themselves more oppressed by the nobility than by the kings. It appears that Charles the Bald,[z] became the greatest enemy of the patrimony of the clergy, whether he was most incensed against them for having degraded his father on their account, or whether he was the most timorous. Be that as it may, we meet with continual quarrels in the Capitularies,[a] between the clergy who demanded their estates and the no-

[x] See what the bishops say in the Synod of the year 845, "apud Teudonis villam," art. 4.

[y] See the Synod in the year 845, "apud Teudonis villam," arts. 3 and 4, which gives a very exact description of things; as also, that of the same year, held at the palaces of Vernes, art. 12, and the Synod of Beauvais, also in the same year, arts. 3, 4, and 6, and the Capitulary in "Villa Sparnaco" in the year 846, art. 20, and the letter which the bishops assembled at Rheims wrote in 858, to Louis, King of Germany, art. 8.

[z] See the Capitulary in "Villa Sparnaco," in the year 846. The nobility had set the King against the bishops, insomuch that he expelled them from the Assembly; a few of the canons enacted in council were picked out, and the prelates were told that these were the only ones which should be observed; nothing was granted them that could be refused. See arts. 20, 21, and 22. See also the letter which the bishops assembled at Rheims wrote in the year 858 to Louis, King of Germany, and the Edict of Pistes, in the year 864, art. 5.

[a] See this very Capitulary in the year 846, "in Villa Sparnaco." See also the Capitulary of the assembly held "apud Marsnam" in the year 847, art. 4,

bility who refused or deferred to restore them; and the kings acting as mediators.

The situation of affairs at that time is a spectacle really deserving of pity. While Louis the Debonnaire made immense donations out of his demesnes to the clergy, his children distributed the church lands among the laity. The same prince with one hand founded new abbeys and despoiled old ones. The clergy had no fixed state; one moment they were plundered, another they received satisfaction; but the crown was continually losing.

Toward the close of the reign of Charles the Bald, and from that time forward, there was an end of the disputes of the clergy and laity, concerning the restitution of church lands. The bishops, indeed, breathed out still a few sighs in their remonstrances to Charles the Bald, which we find in the Capitulary of the year 856, and in the letter they wrote to Louis, King of Germany, in the year 858:[b] but they proposed things, and challenged promises, so often eluded, that we plainly see they had no longer any hopes of obtaining their desire.

All that could be expected then was to repair in general the injuries done both to church and state.[c] The kings engaged not to deprive the nobility of their freemen, and not to give away any more church lands by precepts,[d] so that the interests of the clergy and nobility seemed then to be united.

The dreadful depredations of the Normans, as I have already observed, contributed greatly to put an end to those quarrels.

The authority of our kings diminishing every day, both for the reasons already given and those which I shall mention hereafter, they imagined they had no better resource left, than to resign themselves into the hands of the clergy. But the ecclesiastics had weakened the power of the kings, and these had diminished the influence of the ecclesiastics.

In vain did Charles the Bald and his successors call in the

wherein the clergy reduced themselves to demand only the restitution of what they had been possessed of under Louis the Debonnaire. See also the Capitulary of the year 851, "apud Marsnam," arts. 6 and 7, which confirms the nobility and clergy in their several possessions; and that "apud Bonoilum," in the year 856, which is a remonstrance of the bishops to the King, because the evils, after so many laws, had not been redressed; and, in fine, the letter which the bishops assembled at Rheims wrote in the year 858, to Louis, King of Germany, art. 8.

b Art. 8.

c See the Capitulary of the year 852, arts. 6 and 7.

d Charles the Bald, in the Synod of Soissons, says, that he "had promised the bishops not to issue any more precepts relating to church lands." Capitulary of the year 853, art. 11, Baluzius's edition, tom. ii. p. 56.

Church to support the state, and to prevent its ruin; in vain did they make use of the respect which the commonalty had for that body,[e] to maintain that which they should also have for their prince;[f] in vain did they endeavor to give an authority to their laws by that of the canons; in vain did they join the ecclesiastic with the civil punishments;[g] in vain to counterbalance the authority of the count did they give to each bishop the title of their commissary in the several provinces:[h] it was impossible to repair the mischief they had done; and a terrible misfortune which I shall presently mention proved the ruin of the monarchy.

24.—*That the Freemen were rendered capable of holding Fiefs*

I said that the freemen were led against the enemy by their count, and the vassals by their lord. This was the reason that the several orders of the state balanced each other, and though the king's vassals had other vassals under them, yet they might be overawed by the count who was at the head of all the freemen of the monarchy.

The freemen were not allowed at first to do homage for a fief; but in process of time this was permitted:[i] and I find that this change was made during the period that elapsed from the reign of Gontram to that of Charlemagne. This I prove by the comparison which may be made between the Treaty of Andely,[j] by Gontram, Childebert, and Queen Brunehaut, and the partition made by Charlemagne among his children, as well as a like partition by Louis the Debonnaire.[k] These three acts contain nearly the same regulations with regard to the vassals; and as they determine the very same points, under almost the same circumstances, the spirit as well as the letter of those three treaties in this respect are very much alike.

e See the Capitulary of Charles the Bald, "apud Saponarias," in the year 859, art. 3: "Venilon, whom I made Archbishop of Sens, has consecrated me; and I ought not to be expelled the kingdom by anybody," "saltem sine audientia et judicio episcoporum, quorum ministerio in regem sum consecratus, et qui throni Dei sunt dicti, in quibus Deus sedet, et per quos sua decernit judicia, quorum paternis correctionibus et castigatoriis judiciis me subdere fui paratus et in præsenti sum subditus."

f See the Capitulary of Charles the Bald, "de Carisiaco," in the year 857, Baluzius's edition, tom. ii. p. 88, secs. 1, 2, 3, 4, and 7.

g See the Synod of Pistes in the year 862, art. 4, and the Capitulary of Louis II, "apud vernis palatium," in the year 883, arts. 4 and 5.

h Capitulary of the year 876, under Charles the Bald, "in Synodo Pontigonensi," Baluzius's edition, art. 12.

i See what has been said already, Book XXX., last chapter towards the end.

j In the year 587, in Gregory of Tours, book ix.

k See the following chapter, where I shall speak more diffusely of those partitions; and the notes in which they are quoted.

But as to what concerns the freemen there is a vital difference. The Treaty of Andely does not say that they might do homage for a fief; whereas we find in the divisions of Charlemagne and Louis the Debonnaire, express clauses to empower them to do homage. This shows that a new usage had been introduced after the treaty of Andely, whereby the freemen had become capable of this great privilege.

This must have happened when Charles Martel, after distributing the church lands to his soldiers, partly in fief, and partly as *allodia*, made a kind of revolution in the feudal laws. It is very probable that the nobility who were seized already of fiefs found a greater advantage in receiving the new grants as *allodia;* and that the freemen thought themselves happy in accepting them as fiefs.

The Principal Cause of the Humiliation of the Second Race

25.—*Changes in the Allodia*

Charlemagne in the partition[l] mentioned in the preceding chapter ordained, that after his death the vassals belonging to each king should be permitted to receive benefices in their own sovereign's dominion, and not in those of another;[m] whereas they may keep their allodial estates in any of their dominions.[n] But he adds,[o] that every freeman might, after the death of his lord, do homage in any of the three kingdoms he pleased, as well as he that never had been subject to a lord. We find the same regulations in the partition which Louis the Debonnaire made among his children in the year 817.

But though the freemen had done homage for a fief, yet the count's militia was not thereby weakened: the freeman was still obliged to contribute for his *allodium*, and to get people ready for the service belonging to it, at the proportion of one man to four manors; or else to procure a man that should do the duty of the fief in his stead. And when some abuses had been intro-

l In the year 806, between Charles, Pepin, and Louis, it is quoted by Goldast, and by Baluzius, tom. ii. p. 439.

m Art. IX. p. 143, which is agreeable to the Treaty of Andely, in Gregory of Tours, book IX.

n Art. 10, and there is no mention made of this in the Treaty of Andely.

o In Baluzius, tom. i. p. 174. "Licentiam habeat unusquisque liber homo qui seniorum non habuerit, cuicumque ex his tribus fratribus voluerit, se commendandi," art. 9. See also the division made by the same Emperor, in the year 837, art. 6, Baluzius's edition, p. 686.

duced upon this head they were redressed, as appears by the constitutions of Charlemagne,[p] and by that of Pepin, King of Italy, which explain each other.[q]

The remark made by historians that the battle of Fontenay was the ruin of the monarchy is very true; but I beg leave to cast an eye on the unhappy consequences of that day.

Some time after the battle, the three brothers, Lotharius, Louis, and Charles made a treaty,[r] wherein I find some clauses which must have altered the whole political system of the French government.

In the declaration[s] which Charles made to the people of the part of the treaty relating to them, he says that every freeman might choose whom he pleased for his lord,[t] whether the king or any of the nobility. Before this treaty the freeman might do homage for a fief; but his *allodium* still continued under the immediate power of the King, that is, under the count's jurisdiction; and he depended on the lord to whom he vowed fealty, only on account of the fief which he had obtained. After that treaty every freeman had a right to subject his *allodium* to the King, or to any other lord, as he thought proper. The question is not in regard to those who put themselves under the protection of another for a fief, but to such as changed their allodial into a feudal land, and withdrew themselves, as it were, from the civil jurisdiction to enter under the power of the King, or of the lord whom they thought proper to choose.

Thus it was, that those who formerly were only under the King's power, as freemen under the count, became insensibly vassals one of another, since every freeman might choose whom he pleased for his lord, the King or any of the nobility.

2. If a man changed an estate which he possessed in perpetuity into a fief, this new fief could no longer be only for life. Hence we see, a short time after, a general law for giving the fiefs to the children of the present possessor:[u] it was made by Charles the Bald, one of the three contracting princes.

[p] In the year 811, Baluzius's edition, tom. i. p. 486, arts. 7 and 8, and that of the year 812, ibid. p. 490, art. 1. "Ut omnis liber homo qui quatuor mansos vestitos de proprio suo, sive de alicujus beneficio, habet, ipse se præparet, et ipse in hostem pergat sive cum seniore suo," etc. See also the Capitulary of the year 807, Baluzius's edition, tom. i. p. 458.

[q] In the year 793, inserted in the law of the Lombards, book III. tit. 9, chap. ix.

[r] In the year 847, quoted by Aubert le Mire, and Baluzius, tom. ii. page 42. "Conventus apud Marsnam."

[s] "Adnunciatio."

[t] "Ut unusquisque liber homo in nostro regno seniorem quem voluerit in nobis et in nostris fidelibus accipiat," art. 2, of the Declaration of Charles.

[u] Capitulary of the year 877, tit. 53,

What has been said concerning the liberty every freeman had in the monarchy, after the treaty of the three brothers, of choosing whom he pleased for his lord, the King or any of the nobility, is confirmed by the acts subsequent to that time.

In the reign of Charlemagne,[v] when the vassal had received a present of a lord, were it worth only a sou, he could not afterwards quit him. But under Charles the Bald, the vassals might follow what was agreeable to their interests or their inclination with entire safety;[w] and so strongly does this prince explain himself on the subject that seems rather to encourage them in the enjoyment of this liberty than to restrain it. In Charlemagne's time, benefices were rather personal than real; afterwards they became rather real than personal.

26.—*Changes in the Fiefs*

The same changes happened in the fiefs as in the *allodia*. We find by the Capitulary of Compiègne,[x] under King Pepin, that those who had received a benefice from the King gave a part of this benefice to different bondmen; but these parts were not distinct from the whole. The King revoked them when he revoked the whole; and at the death of the King's vassal the rear-vassal lost also his rear-fief: and a new beneficiary succeeded, who likewise established new rear-vassals. Thus it was the person and not the rear-fief that depended on the fief; on the one hand, the rear-vassal returned to the King because he was not tied forever to the vassal; and the rear-fief returned also to the King, because it was the fief itself and not a dependence of it.

Such was the rear-vassalage, while the fiefs were during pleasure; and such was it also while they were for life. This was altered when the fiefs descended to the next heirs, and the rear-fiefs the same. That which was held before immediately of the King was held now mediately; and the regal power was thrown

arts. 9 and 10, "apud Carisiacum," "similiter et de nostris vassallis faciendum est," etc. This capitulary relates to another of the same year, and of the same place, art. 3.

v Capitulary of Aix-la-Chapelle, in the year 813, art. 16, "quod nullus seniorem suum dimittat post quam ab eo acceperit valente solidum unum"; and the Capitulary of Pepin, in the year 783, art. 5.

w See the Capitulary de Carisiaco in the year 856, arts. 10 and 13, Baluzius's edition, tom. ii. p. 83, in which the King, together with the lords spiritual and temporal, agreed to this: "Et si aliquis de vobis talis est cui suus seniorатus non placet, et illi simulat ut ad alium seniorem melius quam ad illum acaptare possit, veniat ad illum, et ipse tranquillo et pacifico animo donet illi commeatum . . . et quod Deus illi cuperit et ad alium seniorem acaptare potuerit, pacifice habeat."

x In the year 757, art. 6, Baluzius's edition, p. 181.

back, as it were, one degree, sometimes two; and oftentimes more.

We find in the books of fiefs,[y] that though the king's vassals might give away in fief, that is, in rear-fief, to the king, yet these rear-vassals, or petty vavassors could not give also in fief; so that whatever they had given, they might always resume. Besides, a grant of that kind did not descend to the children like the fiefs, because it was not supposed to have been made according to the feudal laws.

If we compare the situation in which the rear-vassalage was at the time when the two Milanese Senators wrote those books, with what it was under King Pepin, we shall find that the rear-fiefs preserved their primitive nature longer than the fiefs.[z]

But when those Senators wrote, such general exceptions had been made to this rule as had almost abolished it. For if a person who had received a fief of a rear-vassal happened to follow him upon an expedition to Rome, he was entitled to all the privileges of a vassal.[a] In like manner, if he had given money to the rear-vassal to obtain the fief, the latter could not take it from him, nor hinder him from transmitting it to his son, till he returned him his money: in fine, this rule was no longer observed by the Senate of Milan.[b]

27.—*Another change which happened in the Fiefs*

In Charlemagne's time they were obliged,[c] under great penalties, to repair to the general meeting in case of any war whatsoever; they admitted of no excuses, and if the count exempted anyone he was liable himself to be punished. But the treaty of the three brothers[d] made a restriction upon this head which rescued the nobility, as it were, out of the King's hands, they were no longer obliged to serve him in time of war; except when the war was defensive.[e] In others, they were at liberty to follow their lord, or to mind their own business. This treaty relates to another,[f] concluded five years before between the two brothers,

y Book I. chap. i.
z At least in Italy and Germany.
a Book I. of fiefs, chap. i.
b Ibid.
c Capitulary of the year 802, art. 7, Baluzius's edition, p. 365.
d "Apud Marsnam," in the year 847, Baluzius's edition, p. 42.
e "Volumus ut cujuscumque nostrûm homo in cujuscumque regno sit, cum seniore suo in hostem, vel aliis suis utilitatibus, pergat, nisi talis regni invasio quam Lantuveri dicunt, quod absit, acciderit, ut omnis populus illius regni ad eam repellendam communiter pergat," art. 5, ibid. p. 44.
f "Apud Argentoratum," in Baluzius, Capitularies, tom. ii. p. 39.

Charles the Bald and Louis, King of Germany, by which these princes release their vassals from serving them in war, in case they should attempt hostilities against each other; an agreement which the two princes confirmed by oath, and at the same time made their armies swear to it.

The death of a hundred thousand French, at the battle of Fontenay, made the remains of the nobility imagine that by the private quarrels of their kings about their respective shares, their whole body would be exterminated, and that the ambition and jealousy of those princes would end in the destruction of all the best families of the kingdom. A law was therefore passed, that the nobility should not be obliged to serve their princes in war unless it was to defend the state against a foreign invasion. This law obtained for several ages.*g*

28.—*Changes which happened in the great Offices, and in the Fiefs*

The many changes introduced into the fiefs in particular cases seemed to spread so widely as to be productive of general corruption. I noticed that in the beginning several fiefs had been alienated in perpetuity; but those were particular cases, and the fiefs in general preserved their nature; so that if the crown lost some fiefs it substituted others in their stead. I observed, likewise, that the crown had never alienated the great offices in perpetuity.*h*

But Charles the Bald made a general regulation, which equally affected the great offices and the fiefs. He ordained, in his Capitularies, that the counties should be given to the children of the count, and that this regulation should also take place in respect to the fiefs.*i*

We shall see presently that this regulation received a wider extension, insomuch that the great offices and fiefs went even to distant relatives. Thence it followed that most of the lords who before this time had held immediately of the Crown held now

g See the law of Guy, King of the Romans, among those which were added to the Salic law, and to that of the Lombards, tit. 6, sec. 2, in Echard.

h Some authors pretend that the County of Toulouse had been given away by Charles Martel, and passed by inheritance down to Raymond, the last count; but, if this be true, it was owing to some circumstances which might have been an inducement to choose the Counts of Toulouse from among the children of the last possessor.

i See his Capitulary of the year 877, tit. 53, arts. 9 and 10, "apud Carisiacum." This capitulary bears relation to another of the same year and place, art. 3.

mediately. Those counts who formerly administered justice in the King's *placita*, and who led the freemen against the enemy, found themselves situated between the King and his freemen; and the King's power was removed further off another degree.

Again, it appears from the Capitularies,[j] that the counts had benefices annexed to their counties, and vassals under them. When the counties became hereditary, the count's vassals were no longer the immediate vassals of the king; and the benefices annexed to the counties were no longer the king's benefices; the counts grew powerful because the vassals whom they had already under them enabled them to procure others.

In order to be convinced how much the monarchy was thereby weakened towards the end of the second race we have only to cast an eye on what happened at the beginning of the third, when the multiplicity of rear-fiefs flung the great vassals into despair.

It was a custom of the kingdom [k] that when the elder brothers had given shares to their younger brothers the latter paid homage to the elder; so that those shares were held of the lord paramount only as a rear-fief. Philip Augustus, the Duke of Burgundy, the Counts of Nevers, Boulogne, St. Paul, Dampierre, and other lords declared [l] that henceforward, whether the fiefs were divided by succession or otherwise, the whole should be always of the same lord, without any intermediation. This ordinance was not generally followed; for, as I have elsewhere observed, it was impossible to make general ordinances at that time; but many of our customs were regulated by them.

29.—*Of the Nature of the Fiefs after the Reign of Charles the Bald*

We have observed that Charles the Bald ordained that when the possessor of a great office or of a fief left a son at his death, the office or fief should devolve to him. It would be a difficult matter to trace the progress of the abuses which thence resulted, and of the extension given to that law in each country. I find

j The third Capitulary of the year 812, art. 7, and that of the year 815, art. 6, on the Spaniards. The collection of the Capitularies, book 5, art. 223, and the Capitulary of the year 869, art. 2, and that of the year 877, art. 13, Baluzius's edition.

k As appears from Otho of Frisingen, "of the actions of Frederic," book II. chap. xxix.

l See the ordinance of Philip Augustus in the year 1209, in the new collection.

in the books of fiefs,[m] that towards the beginning of the reign of the Emperor Conrad II the fiefs situated in his dominions did not descend to the grandchildren: they descended only to one of the last possessor's children, who had been chosen by the lord:[n] thus the fiefs were given by a kind of election, which the lord made among the children.

In the seventeenth chapter of this book we have explained in what manner the crown was in some respects elective, and in others hereditary under the second race. It was hereditary, because the kings were always taken from that family, and because the children succeeded; it was elective, by reason that the people chose from among the children. As things proceed step by step, and one political law has constantly some relation to another political law, the same spirit was followed in the succession of fiefs, as had been observed in the succession to the crown.[o] Thus the fiefs were transmitted to the children by the right of succession, as well as of election; and each fief became both elective and hereditary, like the crown.

This right of election [p] in the person of the lord was not subsisting at the time of the authors [q] of the book of fiefs, that is, in the reign of the Emperor Frederick I.

30.—*The same Subject continued*

It is mentioned in the books of fiefs, that when the Emperor Conrad set out for Rome, the vassals in his service presented a petition to him that he would please to make a law that the fiefs which descended to the children should descend also to the grandchildren; and that he whose brother died without legitimate heirs might succeed to the fief which had belonged to their common father.[r] This was granted.

In the same place it is said (and we are to remember that those writers lived at the time of the Emperor Frederick I) [s] "that the ancient jurists had always been of opinion [t] that the succes-

[m] Book I. tit. 1.

[n] "Sic progressum est, ut ad filios deveniret in quem Dominus hoc vellet beneficium confirmare."—Ibid.

[o] At least in Italy and Germany.

[p] "Quod hodie ita stabilitum est, ut ad omnes æqualiter veniat."—Book I. of the fiefs, tit. 1.

[q] Gerardus Niger and Aubertus de Orto.

[r] "Cum vero Conradus Romam proficisceretur, petitum est a fidelibus qui in ejus erant servitio, ut, lege ab eo promulgatâ, hoc etiam ad nepotes ex filio producere dignaretur, et ut frater fratri sine legitimo hærede defuncto in beneficio quod eorum patris fuit, succederet."—Book I. of fiefs, tit. 1.

[s] Cujas has proved it extremely well.

[t] "Sciendum est quod beneficium advenientes ex latere, ultra fratres patrueles non progreditur successione a

sion of fiefs in a collateral line did not extend further than to brothers-german, though of late it was carried as far as the seventh degree, and by the new code they had extended it in a direct line *in infinitum*." It is thus that Conrad's law was insensibly extended.

All these things being supposed, the bare perusal of the history of France is sufficient to demonstrate that the perpetuity of fiefs was established earlier in this kingdom than in Germany. Towards the commencement of the reign of the Emperor Conrad II in 1024, things were upon the same footing still in Germany, as they had been in France during the reign of Charles the Bald, who died in 877. But such were the changes made in this kingdom after the reign of Charles the Bald, that Charles the Simple found himself unable to dispute with a foreign house his incontestable rights to the empire; and, in fine, that in Hugh Capet's time the reigning family, stripped of all its demesnes, was no longer in a condition to maintain the crown.

The weak understanding of Charles the Bald produced an equal weakness in the French monarchy. But as his brother, Louis, King of Germany, and some of that prince's successors were men of better parts, their government preserved its vigor much longer.

But what do I say? Perhaps the phlegmatic constitution, and, if I dare use the expression, the immutability of spirit peculiar to the German nation made a longer stand than the volatile temper of the French against that disposition of things, which perpetuated the fiefs by a natural tendency, in families.

Besides, the Kingdom of Germany was not laid waste and annihilated, as it were, like that of France, by that particular kind of war with which it had been harassed by the Normans and Saracens. There were less riches in Germany, fewer cities to plunder, less extent of coast to scour, more marshes to get over, more forest to penetrate. As the dominions of those princes were less in danger of being ravaged and torn to pieces they had less need of their vassals and consequently less dependence on them. And in all probability, if the emperors of Germany had not been obliged to be crowned at Rome, and to make con-

antiquis sapientibus constitutum, licet moderno tempore usque ad septimum geniculum sit usurpatum, quod in masculis descendentibus novo jure in infinitum extenditur."—Ibid.

tinual expeditions into Italy, the fiefs would have preserved their primitive nature much longer in that country.

31.—*In what Manner the Empire was transferred from the Family of Charlemagne*

The empire, which, in prejudice to the branch of Charles the Bald, had been already given to the bastard line of Louis, King of Germany,[u] was transferred to a foreign house by the election of Conrad, Duke of Franconia, in 912. The reigning branch in France being hardly able to contest a few villages was much less in a situation to contest the empire. We have an agreement entered into between Charles the Simple, and the Emperor Henry I, who had succeeded to Conrad. It is called the Compact of Bonn.[v] These two princes met in a vessel which had been placed in the middle of the Rhine, and swore eternal friendship. They used on this occasion an excellent middle term. Charles took the title of King of West France, and Henry that of King of East France. Charles contracted with the King of Germany, and not with the Emperor.

32.—*In what Manner the Crown of France was transferred to the House of Hugh Capet*

The inheritance of the fiefs, and the general establishment of rear-fiefs, extinguished the political and formed a feudal government. Instead of that prodigious multitude of vassals who were formerly under the king, there were now a few only, on whom the others depended. The kings had scarcely any longer a direct authority; a power which was to pass through so many other and through such great powers either stopped or was lost before it reached its term. Those great vassals would no longer obey; and they even made use of their rear-vassals to withdraw their obedience. The kings, deprived of their demesnes and reduced to the cities of Rheims and Laon were left exposed to their mercy; the tree stretched out its branches too far, and the head was withered. The kingdom found itself without a demesne, as the empire is at present. The crown was, therefore, given to one of the most potent vassals.

The Normans ravaged the kingdom; they sailed in open boats

[u] Arnold and his son Louis IV.

[v] In the year 926, quoted by Aubert le Mire, "Cod. donationum piarum," chap. xxvii.

or small vessels, entered the mouths of rivers, and laid the country waste on both sides. The cities of Orleans and Paris put a stop to those plunderers, so that they could not advance farther, either on the Seine, or on the Loire.[w] Hugh Capet, who was master of those cities, held in his hands the two keys of the unhappy remains of the kingdom; the crown was conferred upon him as the only person able to defend it. It is thus the empire was afterwards given to a family whose dominions form so strong a barrier against the Turks.

The empire went from Charlemagne's family at a time when the inheritance of fiefs was established only as a mere condescendence. It even appears that this inheritance obtained much later among the Germans than among the French;[x] which was the reason that the empire, considered as a fief, was elective. On the contrary, when the crown of France went from the family of Charlemagne, the fiefs were really hereditary in this kingdom; and the crown, as a great fief, was also hereditary.

But it is very wrong to refer to the very moment of this revolution all the changes which happened, either before or afterwards. The whole was reduced to two events; the reigning family changed, and the crown was united to a great fief.

33.—*Some Consequences of the Perpetuity of Fiefs*

From the perpetuity of fiefs it followed, that the right of seniority or primogeniture was established among the French. This right was quite unknown under the first race;[y] the crown was divided among the brothers, the *allodia* were shared in the same manner; and as the fiefs, whether precarious or for life, were not an object of succession, there could be no partition in regard to those tenures.

Under the second race, the title of Emperor, which Louis the Debonnaire enjoyed, and with which he honored his eldest son, Lotharius, made him think of giving this prince a kind of superiority over his younger brothers. The two kings were obliged to wait upon the Emperor every year, to carry him presents, and to receive much greater from him; they were also to consult

w See the Capitulary of Charles the Bald, in the year 877, "apud Carisiacum," on the importance of Paris, St. Denis, and the castles on the Loire, in those days.

x See above, chap. 30.

y See the Salic Law, and the law of the Ripuarians, in the title of "allodia."

with him upon common affairs.[z] This is what inspired Lotharius with those pretences which met with such bad success. When Agobard wrote in favor of this prince,[a] he alleged the Emperor's own intention, who had associated Lotharius with the empire after he had consulted the Almighty by a three days' fast, by the celebration of the holy mysteries, and by prayers and almsgiving; after the nation had sworn allegiance to him which they could not refuse without perjuring themselves; and after he had sent Lotharius to Rome to be confirmed by the Pope. Upon all this he lays a stress, and not upon his right of primogeniture. He says, indeed, that the Emperor had designed a partition among the younger brothers, and that he had given the preference to the elder; but saying he had preferred the elder was saying at the same time that he might have given the preference to his younger brothers.

But as soon as the fiefs became hereditary, the right of seniority was established in the feudal succession; and for the same reason in that of the crown, which was the great fief. The ancient law of partitions was no longer subsisting; the fiefs being charged with a service, the possessor must have been enabled to discharge it. The law of primogeniture was established, and the right of the feudal law was superior to that of the political or civil institution.

As the fiefs descended to the children of the possessor, the lords lost the liberty of disposing of them; and, in order to indemnify themselves, they established what they called the right of redemption, whereof mention is made in our customs, which at first was paid in a direct line, and by usage came afterwards to be paid only in a collateral line.

The fiefs were soon rendered transferable to strangers as a patrimonial estate. This gave rise to the right of lord's dues, which were established almost throughout the kingdom. These rights were arbitrary in the beginning; but when the practice of granting such permissions became general they were fixed in every district.

The right of redemption was to be paid at every change of heir, and at first was paid even in a direct line.[b] The most general

[z] See the Capitulary of the year 817, which contains the first partition made by Louis the Debonnaire among his children.

[a] See his two letters upon this subject, the title of one of which is "de divisione imperii."

[b] See the ordinance of Philip Augustus, in the year 1209, on the fiefs.

custom had fixed it to one year's income. This was burdensome and inconvenient to the vassal, and affected in some measure the fief itself. It was often agreed in the act of homage that the lord should no longer demand more than a certain sum of money for the redemption, which, by the changes incident to money, became afterwards of no manner of importance.[c] Thus the right of redemption is in our days reduced almost to nothing, while that of the lord's dues is continued in its full extent. As this right concerned neither the vassal nor his heirs, but was a fortuitous case which no one was obliged to foresee or expect, these stipulations were not made, and they continued to pay a certain part of the price.

When the fiefs were for life, they could not give a part of a fief to hold in perpetuity as a rear-fief; for it would have been absurd that a person who had only the usufruct of a thing should dispose of the property of it. But when they became perpetual, this was permitted,[d] with some restrictions made by the customs, which was what they call dismembering their fief.[e]

The perpetuity of feudal tenures having established the right of redemption, the daughters were rendered capable of succeeding to a fief, in default of male issue. For when the lord gave the fief to his daughter, he multiplied the cases of his right of redemption, because the husband was obliged to pay it as well as the wife.[f] This regulation could not take place in regard to the crown, for as it was not held of anyone there could be no right of redemption over it.

The daughter of William V, Count of Toulouse, did not succeed to the county. But Eleanor succeeded to Aquitaine, and Matilda to Normandy; and the right of the succession of females seemed so well established in those days, that Louis the Young, after his divorce from Eleanor, made no difficulty in restoring Guienne to her. But as these two last instances followed close on the first, the general law by which the women were called to the succession of fiefs must have been introduced much later into the county of Toulouse than into the other provinces of France.[g]

c We find several of these conventions in the charters, as in the register book of Vendôme, and that of the abbey in St. Cyprian in Poitou, of which Mr. Galland has given some extracts, p. 55.

d But they could not abridge the fiefs; that is, abolish a portion of it.

e They fixed the portion which they could dismember.

f This was the reason that the lords obliged the widow to marry again.

g Most of the great families had their particular laws of succession. See what M. de la Thaumassière says concerning the families of Berri.

The constitution of several kingdoms of Europe has been directed by the state of feudal tenures at the time when those kingdoms were founded. The women succeeded neither to the crown of France nor to the empire, because at the foundation of those two monarchies they were incapable of succeeding to fiefs. But they succeeded in kingdoms whose foundation was posterior to that of the perpetuity of the fiefs, such as those founded by the Normans, those by the conquests made on the Moors, and others, in fine, which were beyond the limits of Germany, and in later times received in some measure a second birth by the establishment of Christianity.

When these fiefs were at will, they were given to such as were capable of doing service for them, and, therefore, were never bestowed on minors; but when they became perpetual, the lords took the fief into their own hands, till the pupil came of age, either to increase their own emoluments, or to train the ward to the use of arms.[h] This is what our customs call "the guardianship of a nobleman's children," which is founded on principles different from those of tutelage, and is entirely a distinct thing from it.

When the fiefs were for life, it was customary to vow fealty for a fief; and the real delivery, which was made by a sceptre, confirmed the fief, as it is now confirmed by homage. We do not find that the counts, or even the king's commissaries, received the homage in the provinces; nor is this ceremony to be met with in the commissions of those officers which have been handed down to us in the Capitularies. They sometimes, indeed, made all the king's subjects take an oath of allegiance;[i] but so far was this oath from being of the same nature as the service afterwards established by the name of homage, that it was only a ceremony, of less solemnity, occasionally used, either before or after that act of obeisance; in short, it was quite a distinct thing from homage.[j]

[h] We see in the Capitulary of the year 817, "apud Carisiacum," art. 3, Baluzius's edition, tom. ii. p. 269, the moment in which the kings caused the fiefs to be administered in order to preserve them for the minors; an example followed by the lords, and which gave rise to what we have mentioned by the name of "the guardianship of a nobleman's children."

[i] We find the formula thereof in the second Capitulary of the year 802. See also that of the year 854, art. 13, and others.

[j] M. du Cange in the word "hominium," p. 1163, and in the word "fidelitas," p. 474, cites the charters of the ancient homages where these differences are found, and a great number of authorities which may be seen. In paying homage, the vassal put his hand on that of his lord, and took his oath; the oath of fealty was made by swearing on the gospels. The homage was

The counts and the king's commissaries further made those vassals whose fidelity was suspected give occasionally a security, which was called *firmitas*,[k] but this security could not be an homage since kings gave it to each other.[l]

And though the Abbot Suger[m] makes mention of a chair of Dagobert, in which according to the testimony of antiquity, the kings of France were accustomed to receive the homage of the nobility, it is plain that he expresses himself agreeably to the ideas and language of his own time.

When the fiefs descended to the heirs, the acknowledgment of the vassal, which at first was only an occasional service, became a regular duty. It was performed in a more splendid manner, and attended with more formalities, because it was to be a perpetual memorial of the reciprocal duties of the lord and vassal.

I should be apt to think that homages began to be established under King Pepin, which is the time I mentioned that several benefices were given in perpetuity, but I should not think thus without caution, and only upon a supposition that the authors of the ancient annals of the Franks were not ignorant pretenders,[n] who in describing the fealty professed by Tassillon, Duke of Bavaria, to King Pepin, spoke according to the usages of their own time.[o]

34.—*The same Subject continued*

When the fiefs were either precarious or for life they seldom bore a relation to any other than the political laws; for which reason in the civil institutions of those times there is very little mention made of the laws of fiefs. But when they became hereditary, when there was a power of giving, selling, and bequeathing them, they bore a relation both to the political and the civil laws. The fief considered as an obligation of performing military service, depended on the political law; considered as a kind of commercial property, it depended on the civil law. This gave rise to the civil regulations concerning feudal tenures.

performed kneeling, the oath of fealty standing. None but the lord could receive homage, but his officers might take the oath of fealty.—See Littleton, secs. 91, 92, faith and homage, that is, fidelity and homage.

k Capitularies of Charles the Bald in the year 860, "post reditum a Confluentibus," art. 3, Baluzius's edition, p. 145.

l Ibid. art. 1.

m "Lib. de administratione sua."

n Anno 757, chap. xvii.

o "Tassilo venit in vassatico se commendans, per manus sacramenta juravit multa et innumerabilia, reliquiis sanctorum manus imponens et fidelitatem promisit regi Pippino." One would think that here was an homage and an oath of fealty. See the note *j*, preceding page.

When the fiefs became hereditary, the law relating to the order of succession must have been in relation to the perpetuity of fiefs. Hence this rule of the French law, "estates of inheritance do not ascend," [p] was established in spite of the Roman and Salic laws.[q] It was necessary that service should be paid for the fief; but a grandfather or a great-uncle would have been too old to perform any service; this rule thus held good at first only in regard to the feudal tenures, as we learn from Boutillier.[r]

When the fiefs became hereditary, the lords who were to see that service was paid for the fief, insisted that the females who were to succeed to the feudal estate, and I fancy sometimes the males, should not marry without their consent; insomuch that the marriage contracts became in respect to the nobility both of a feudal and a civil regulation.[s] In an act of this kind under the lord's inspection, regulations were made for the succession, with the view that the heirs might pay service for the fief: hence none but the nobility at first had the liberty of disposing of successions by marriage contract, as Boyer [t] and Aufrerius [u] have observed.

It is needless to mention that the power of redemption founded on the old right of the relatives, a mystery of our ancient French jurisprudence I have not time to unravel, could not take place with regard to the fiefs till they became perpetual.

Italiam, Italiam [v].....

I finish my treatise of fiefs at a period where most authors commence theirs.

[p] Book IV. "de feudis," tit. 59.
[q] In the title of "allodia."
[r] "Somme Rurale," book I. tit. 76, p. 447.
[s] According to an ordinance of St. Louis, in the year 1246, to settle the customs of Anjou and Maine; those who shall have the care of the heiress of a fief shall give security to the lord, that she shall not be married without his consent.
[t] Decision 155, No. 8 and 204; and No. 38.
[u] In Capell. Thol. decision 453.
[v] "Æneid," lib. III. v. 523.

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WALTER BAGEHOT.

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PHYSICS AND POLITICS

OR,
THOUGHTS ON THE APPLICATION OF THE PRINCIPLES OF "NATURAL SELECTION" AND "INHERITANCE" TO POLITICAL SOCIETY

BY
WALTER BAGEHOT

WITH A SPECIAL INTRODUCTION BY
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SPECIAL INTRODUCTION

WALTER BAGEHOT was born at Langport, Somersetshire, February 3, 1826, and died March 24, 1877. His father was the managing director of Stuckey's Banking Company; his mother was Miss Stuckey, a woman of brilliant parts. At University College, London, he received the bachelor's degree in 1846, with a mathematical scholarship; and the Master's degree in 1848, with the gold medal in Moral Philosophy. After studying law in the chambers of Mr. Justice Quain and Vice-Chancellor Sir Charles Hall, he went to France before the *coup d'état* in 1851. His letters to the *Inquirer* at this time created an exasperated interest, due to an original and cynical point of view opposed to that generally held by the public. In 1858 he married the daughter of Mr. James Wilson, then editor of the *Economist,* which proved the beginning of nineteen years of a happy married life. The death of Mr. Wilson, two years later, placed Walter Bagehot in the editorial chair of the *Economist,* where he continued to his death. His uncle, Mr. Vincent Stuckey, once connected with the Treasury, and also private secretary to Mr. Huskisson, early stimulated the ability of his nephew for practical finance; but, of course, the greatest influence of this kind came from his position as editor of the most important financial journal of the world. In this latter work he was brought into close intimacy with the ruling politicians of the day, and with the great commercial interests of Great Britain.

In Walter Bagehot was found the unusual combination of logical accuracy with practical common-sense which so preeminently characterized Adam Smith, and which made the former almost the equal in power and economic insight of the famous Scotchman. The evolutionary studies of Darwin and Wallace, moreover, led him to co-ordinate the results of science not

only with economics but with the study of government. Indeed, there is much in the brilliant generalizations of Bagehot which recalls the work of Sir Henry Maine in jurisprudence. In some important points the two men were much alike; each had a wide range of vision, and each had an honest respect for facts. Bagehot, however, was led into a more active and practical life, while his qualities also fitted him for the study of theory and the principles underlying the modern complex political and economic system. He also resembled Sir Henry Maine in the nicety and justice of his historical sense. Few men have equalled him in the power to grasp at the essentials and to avoid the hindering details of institutions. With Bagehot it was more than training; it was an inspiration.

A sound mind in a sound body, overflowing with superabundant spirits, distinctly powerful and original, buoyant, vivacious, swift, he finely illustrated in a way his own evolutionary doctrine. With a deep substratum of English conservatism and practical sense, powerfully affected by the English "cake of custom," yet in his originality, his imagination, his dash, and intellectual fertility, he had the tendency to variation which modified elemental qualities and produced a very unusual type of the Anglo-Saxon. Steeped early in life in theology, philosophy, and poetry, he was yet held in by his English good judgment, his ability to see both sides of a matter, and by a practical knowledge of men and of the actual world of business. This sympathy, as Mr. Hutton expresses it, "with the works of high imagination, and his clear insight into that busy life which does not and cannot take note of works of high imagination, and which would not do the work it does if it could," was the secret of his great power as an economist. This was apparent in other and small ways, as when he was drawn by his liking for the discourse of Crabb Robinson to go to his breakfasts, where absent-mindedness of the host led to much omission of the elements of the meal, but which Bagehot characteristically met by breakfasting before he started out. A reserved man he was, yet with a saving grace of humor. Slavery in early communities is almost justified by his remark that "the patriarchs Abraham, Isaac, and Jacob could not have had the steady calm which marks them, if they had themselves been teased and hurried about their flocks and herds." These, according to Bagehot, should be tended by slaves. It was his

imagination which not only leavened his interpretation of economic life, but also penetrated his superb style.

There was nothing fragile about his mental operations. His robust courage made it easy for him to rub the English consciousness the wrong way in his audacious letters defending Louis Napoleon's *coup d'état*, as well as to pillory English denseness by saying "in real sound stupidity, the English people are unrivalled: you'll hear more wit and better wit in an Irish street row than would keep Westminster Hall in humor for five weeks."

A certain freedom from sentiment, which kept him from sympathy with the "struggle for existence," was, while a defect, also a source of his power in the search for truth. He could not have done Toynbee's work; but the Toynbee type could not have done Bagehot's work. The quality of mind which brought him into close contact with Arthur Hugh Clough, was the realization of the difficulty of finding the truth. In Clough's "ruinous force of the will" to persuade us of illusions which please us, Mr. Hutton finds that which might almost be taken as the motto of "Physics and Politics." Holding that, under the impulse of earlier ages, men are too much disposed to dangerous energy, in this book he has tried to show how, in our complex modern existence, discussion, which will point out difficulties, will restrain the excess of practical activity. He seems to have had the present hour in view when he opposes expansion, on the principle that the practical energy of our Western peoples "is far in advance of the knowledge that would enable them to turn that energy to good account." By suspending action until judgment was more matured, he hoped that the calibre of the English mind, conscience, and taste would be generally raised. The brilliant applications of science to politics in this book, together with his "English Constitution," made the chief foundations of Bagehot's reputation.

His "Lombard Street," and his "Postulates of Political Economy," brilliant though they may be, as hints of what he might have done in Economics, are detatched studies, far removed from the systematic character of his political writing.

The scope of his intellectual activity may be seen in the following list of his writings:

"Letters on the Coup d'Etat of 1851," written to the *In-*

quirer, reprinted in the first volume of "Literary Studies"; "Parliamentary Reform," reprinted from the *National Review,* 1858; "History of the Unreformed Parliament," from the *National Review;* "Estimates of Some Englishmen and Scotchmen," 1858, reprinted from *Prospective* and the *National Review*—long out of print; articles in London *Economist,* 1860–1877; "The English Constitution," 1867; "International Coinage," 1869; "Physics and Politics," 1872; "Lombard Street, a Description of the Money Market," 1873; "Postulates of Political Economy," and other articles from the *Fortnightly Review,* 1876—see "Economic Studies"; "On the Depreciation of Silver," 1877; and the three following, all edited by R. H. Hutton: "Literary Studies," two volumes, 1879; "Economic Studies," 1880; "Biographical Studies," 1881.

J. Laurence Laughlin

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Fac-simile example of Printing in the Fifteenth Century

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PHYSICS AND POLITICS

CHAPTER I

THE PRELIMINARY AGE

Part I

ONE peculiarity of this age is the sudden acquisition of much physical knowledge. There is scarcely a department of science or art which is the same, or at all the same, as it was fifty years ago. A new world of inventions —of railways and of telegraphs—has grown up around us which we cannot help seeing; a new world of ideas is in the air and affects us, though we do not see it. A full estimate of these effects would require a great book, and I am sure I could not write it; but I think I may usefully, in a few papers, show how, upon one or two great points, the new ideas are modifying two old sciences—politics and political economy. Even upon these points my ideas must be incomplete, for the subject is novel; but, at any rate, I may suggest some conclusions, and so show what is requisite even if I do not supply it.

If we wanted to describe one of the most marked results, perhaps the most marked result, of late thought, we should say that by it everything is made "an antiquity." When, in former times, our ancestors thought of an antiquarian, they described him as occupied with coins, and medals, and Druids' stones; these were then the characteristic records of the decipherable past, and it was with these that decipherers busied themselves. But now there are other relics; indeed, all matter is become such. Science tries to find in each bit of earth the record of the causes which made it precisely what it is; those forces have left their trace, she knows, as much as the tact and hand of the artist left their mark on a classical gem. It would

be tedious (and it is not in my way) to reckon up the ingenious questionings by which geology has made part of the earth, at least, tell part of its tale; and the answers would have been meaningless if physiology and conchology and a hundred similar sciences had not brought their aid. Such subsidiary sciences are to the decipherer of the present day what old languages were to the antiquary of other days; they construe for him the words which he discovers, they give a richness and a truth-like complexity to the picture which he paints, even in cases where the particular detail they tell is not much. But what here concerns me is that man himself has, to the eye of science, become "an antiquity." She tries to read, is beginning to read, knows she ought to read, in the frame of each man the result of a whole history of all his life, of what he is and what makes him so,—of all his forefathers, of what they were and of what made them so. Each nerve has a sort of memory of its past life, is trained or not trained, dulled or quickened, as the case may be; each feature is shaped and characterized, or left loose and meaningless, as may happen; each hand is marked with its trade and life, subdued to what it works in;—if we could but see it.

It may be answered that in this there is nothing new; that we always knew how much a man's past modified a man's future; that we all knew how much a man is apt to be like his ancestors; that the existence of national character is the greatest commonplace in the world; that when a philosopher cannot account for anything in any other manner, he boldly ascribes it to an occult quality in some race. But what physical science does is, not to discover the hereditary element, but to render it distinct,—to give us an accurate conception of what we may expect, and a good account of the evidence by which we are led to expect it. Let us see what that science teaches on the subject; and, as far as may be, I will give it in the words of those who have made it a professional study, both that I may be more sure to state it rightly and vividly, and because—as I am about to apply these principles to subjects which are my own pursuit—I would rather have it quite clear that I have not made my premises to suit my own conclusions.

1st, then, as respects the individual, we learn as follows:

"Even while the cerebral hemispheres are entire, and in

full possession of their powers, the brain gives rise to actions which are as completely reflex as those of the spinal cord.

"When the eyelids wink at a flash of light, or a threatened blow, a reflex action takes place, in which the afferent nerves are the optic, the efferent, the facial. When a bad smell causes a grimace, there is a reflex action through the same motor nerve, while the olfactory nerves constitute the afferent channels. In these cases, therefore, reflex action must be effected through the brain, all the nerves involved being cerebral.

"When the whole body starts at a loud noise, the afferent auditory nerve gives rise to an impulse which passes to the medulla oblongata, and thence affects the great majority of the motor nerves of the body.

"It may be said that these are mere mechanical actions, and have nothing to do with the acts which we associate with intelligence. But let us consider what takes place in such an act as reading aloud. In this case, the whole attention of the mind is, or ought to be, bent upon the subject-matter of the book; while a multitude of most delicate muscular actions are going on, of which the reader is not in the slightest degree aware. Thus the book is held in the hand, at the right distance from the eyes; the eyes are moved, from side to side, over the lines, and up and down the pages. Further, the most delicately adjusted and rapid movements of the muscles of the lips, tongue, and throat, of laryngeal and respiratory muscles, are involved in the production of speech. Perhaps the reader is standing up and accompanying the lecture with appropriate gestures. And yet every one of these muscular acts may be performed with utter unconsciousness, on his part, of anything but the sense of the words in the book. In other words, they are reflex acts.

"The reflex actions proper to the spinal cord itself are natural, and are involved in the structure of the cord and the properties of its constituents. By the help of the brain we may acquire an affinity of artificial reflex actions. That is to say, an action may require all our attention and all our volition for its first, or second, or third performance, but by frequent repetition it becomes, in a manner, part of our organization, and is performed without volition, or even consciousness.

"As everyone knows, it takes a soldier a very long time to

learn his drill—to put himself, for instance, into the attitude of 'attention' at the instant the word of command is heard. But, after a time, the sound of the word gives rise to the act, whether the soldier be thinking of it or not. There is a story, which is credible enough, though it may not be true, of a practical joker, who, seeing a discharged veteran carrying home his dinner, suddenly called out 'Attention!' whereupon the man instantly brought his hands down, and lost his mutton and potatoes in the gutter. The drill had been gone through, and its effects had become embodied in the man's nervous structure.

"The possibility of all education (of which military drill is only one particular form) is based upon the existence of this power which the nervous system possesses, of organizing conscious actions into more or less unconscious, or reflex, operations. It may be laid down as a rule, that if any two mental states be called up together, or in succession, with due frequency and vividness, the subsequent production of the one of them will suffice to call up the other, and that whether we desire it or not." *

The body of the accomplished man has thus become by training different from what it once was, and different from that of the rude man; it is charged with stored virtue and acquired faculty which come away from it unconsciously.

Again, as to race, another authority teaches:—"Man's life truly represents a progressive development of the nervous system, none the less so because it takes place out of the womb instead of in it. The regular transmutation of motions which are at first voluntary into secondary automatic motions, as Hartley calls them, is due to a gradually effected organization; and we may rest assured of this, that co-ordinate activity always testifies to stored-up power, either innate or acquired.

"The way in which an acquired faculty of the parent animal is sometimes distinctly transmitted to the progeny as a heritage, instinct, or innate endowment, furnishes a striking confirmation of the foregoing observations. Power that has been laboriously acquired and stored up as statical in one generation manifestly in such case becomes the inborn faculty of the next; and the development takes place in accordance with that law

* Huxley's "Elementary Physiology," pp. 284—286.

of increasing specialty and complexity of adaptation to external nature which is traceable through the animal kingdom; or, in other words, that law of progress from the general to the special in development which the appearance of nerve force amongst natural forces and the complexity of the nervous system of man both illustrate. As the vital force gathers up, as it were, into itself inferior forces, and might be said to be a development of them, or, as in the appearance of nerve force, simpler and more general forces are gathered up and concentrated in a more special and complex mode of energy; so again a further specialization takes place in the development of the nervous system, whether watched through generations or through individual life. It is not by limiting our observations to the life of the individual, however, who is but a link in the chain of organic beings connecting the past with the future, that we shall come at the full truth; the present individual is the inevitable consequence of his antecedents in the past, and in the examination of these alone do we arrive at the adequate explanation of him. It behooves us, then, having found any faculty to be innate, not to rest content there, but steadily to follow backwards the line of causation, and thus to display, if possible, its manner of origin. This is the more necessary with the lower animals, where so much is innate." *

The special laws of inheritance are indeed as yet unknown. All which is clear, and all which is to my purpose is, that there is a tendency, a probability, greater or less according to circumstances, but always considerable, that the descendants of cultivated parents will have, by born nervous organization, a greater aptitude for cultivation than the descendants of such as are not cultivated; and that this tendency augments, in some enhanced ratio, for many generations.

I do not think any who do not acquire—and it takes a hard effort to acquire—this notion of a transmitted nerve element will ever understand "the connective tissue" of civilization. We have here the continuous force which binds age to age, which enables each to begin with some improvement on the last, if the last did itself improve; which makes each civilization not a set of detached dots, but a line of color, surely enhancing shade by shade. There is, by this doctrine, a physical

* Maudsley on the "Physiology and Pathology of the Mind," p. 73.

cause of improvement from generation to generation: and no imagination which has apprehended it can forget it; but unless you appreciate that cause in its subtle materialism, unless you see it, as it were, playing upon the nerves of men, and, age after age, making nicer music from finer chords, you cannot comprehend the principle of inheritance either in its mystery or its power.

These principles are quite independent of any theory as to the nature of matter, or the nature of mind. They are as true upon the theory that mind acts on matter—though separate and altogether different from it—as upon the theory of Bishop Berkeley that there is no matter, but only mind; or upon the contrary theory—that there is no mind, but only matter; or upon the yet subtler theory now often held—that both mind and matter are different modifications of some one *tertium quid*, some hidden thing or force. All these theories admit —indeed they are but various theories to account for—the fact that what we call matter has consequences in what we call mind, and that what we call mind produces results in what we call matter; and the doctrines I quote assume only that. Our mind in some strange way acts on our nerves, and our nerves in some equally strange way store up the consequences, and somehow the result, as a rule and commonly enough, goes down to our descendants; these primitive facts all theories admit, and all of them labor to explain.

Nor have these plain principles any relation to the old difficulties of necessity and freewill. Every Freewillist holds that the special force of free volition is applied to the pre-existing forces of our corporeal structure; he does not consider it as an agency acting *in vacuo*, but as an agency acting upon other agencies. Every Freewillist holds that, upon the whole, if you strengthen the motive in a given direction, mankind tend more to act in that direction. Better motives—better impulses, rather—come from a good body: worse motives or worse impulses come from a bad body. A Freewillist may admit as much as a Necessarian that such improved conditions tend to improve human action, and that deteriorated conditions tend to deprave human action. No Freewillist ever expects as much from St. Giles's as he expects from Belgravia: he admits an hereditary nervous system as a *datum* for the will,

though he holds the will to be an extraordinary incoming "something." No doubt the modern doctrine of the "Conservation of Force," if applied to decision, is inconsistent with free will; if you hold that force "is never lost or gained," you cannot hold that there is a real gain—a sort of new creation of it in free volition. But I have nothing to do here with the universal "Conservation of Force." The conception of the nervous organs as stores of will-made power does not raise or need so vast a discussion.

Still less are these principles to be confounded with Mr. Buckle's idea that material forces have been the main-springs of progress, and moral causes secondary, and, in comparison, not to be thought of. On the contrary, moral causes are the first here. It is the action of the will that causes the unconscious habit; it is the continual effort of the beginning that creates the hoarded energy of the end; it is the silent toil of the first generation that becomes the transmitted aptitude of the next. Here physical causes do not create the moral, but moral create the physical; here the beginning is by the higher energy, the conservation and propagation only by the lower. But we thus perceive how a science of history is possible, as Mr. Buckle said—a science to teach the laws of tendencies—created by the mind, and transmitted by the body—which act upon and incline the will of man from age to age.

Part II

But how do these principles change the philosophy of our politics? I think in many ways; and first, in one particularly. Political economy is the most systematized and most accurate part of political philosophy; and yet, by the help of what has been laid down, I think we may travel back to a sort of "pre-economic age," when the very assumptions of political economy did not exist, when its precepts would have been ruinous, and when the very contrary precepts were requisite and wise.

For this purpose I do not need to deal with the dim ages which ethnology just reveals to us—with the stone age, and the flint implements, and the refuse-heaps. The time to which I would go back is only that just before the dawn of history—coeval with the dawn, perhaps, it would be right to say—for

the first historians saw such a state of society, though they saw other and more advanced states, too: a period of which we have distinct descriptions from eye-witnesses, and of which the traces and consequences abound in the oldest law. "The effect," says Sir Henry Maine, the greatest of our living jurists —the only one, perhaps, whose writings are in keeping with our best philosophy—"of the evidence derived from comparative jurisprudence is to establish that view of the primeval condition of the human race which is known as the Patriarchal Theory. There is no doubt, of course, that this theory was originally based on the Scriptural history of the Hebrew patriarchs in Lower Asia; but, as has been explained already, its connection with Scripture rather militated than otherwise against its reception as a complete theory, since the majority of the inquirers who till recently addressed themselves with most earnestness to the colligation of social phenomena, were either influenced by the strongest prejudice against Hebrew antiquities or by the strongest desire to construct their system without the assistance of religious records. Even now there is perhaps a disposition to undervalue these accounts, or rather to decline generalizing from them, as forming part of the traditions of a Semitic people. It is to be noted, however, that the legal testimony comes nearly exclusively from the institutions of societies belonging to the Indo-European stock, the Romans, Hindoos, and Sclavonians supplying the greater part of it; and indeed the difficulty, at the present stage of the inquiry, is to know where to stop, to say of what races of men it is not allowable to lay down that the society in which they are united was originally organized on the patriarchal model. The chief lineaments of such a society, as collected from the early chapters in Genesis, I need not attempt to depict with any minuteness, both because they are familiar to most of us from our earliest childhood, and because, from the interest once attaching to the controversy which takes its name from the debate between Locke and Filmer, they fill a whole chapter, though not a very profitable one, in English literature. The points which lie on the surface of the history are these:—The eldest male parent—the eldest ascendant—is absolutely supreme in his household. His dominion extends to life and death, and is as unqualified over his children and their houses

as over his slaves; indeed the relations of sonship and serfdom appear to differ in little beyond the higher capacity which the child in blood possesses of becoming one day the head of a family himself. The flocks and herds of the children are the flocks and herds of the father, and the possessions of the parent, which he holds in a representative rather than in a proprietary character, are equally divided at his death among his descendants in the first degree, the eldest son sometimes receiving a double share under the name of birthright, but more generally endowed with no hereditary advantage beyond an honorary precedence. A less obvious inference from the Scriptural accounts is that they seem to plant us on the traces of the breach which is first effected in the empire of the parent. The families of Jacob and Esau separate and form two nations; but the families of Jacob's children hold together and become a people. This looks like the immature germ of a state or commonwealth, and of an order of rights superior to the claims of family relation.

"If I were attempting for the more special purposes of the jurist to express compendiously the characteristics of the situation in which mankind disclose themselves at the dawn of their history, I should be satisfied to quote a few verses from the 'Odyssee' of Homer:—

"'τοῖσιν δ' οὔτ' ἀγοραὶ βουληφόροι οὔτε θέμιστες.
θεμιστεύει δὲ ἕκστος
παίδων ἠδ' ἀλόχων, οὐτ' ἀλλήλων ἀλέγουσιν.'"

"They have neither assemblies for consultation nor *themistes*, but everyone exercises jurisdiction over his wives and his children, and they pay no regard to one another."

And this description of the beginnings of history is confirmed by what may be called the last lesson of pre-historic ethnology. Perhaps it is the most valuable, as it is clearly the most sure result of that science, that it has dispelled the dreams of other days as to a primitive high civilization. History catches man as he emerges from the patriarchal state: ethnology shows how he lived, grew, and improved in that state. The conclusive arguments against the imagined original civilization are indeed plain to everyone. Nothing is more intelligible than a moral deterioration of mankind—nothing

than an æsthetic degradation—nothing than a political degradation. But you cannot imagine mankind giving up the plain utensils of personal comfort, if they once knew them; still less can you imagine them giving up good weapons—say bows and arrows—if they once knew them. Yet if there were a primitive civilization these things must have been forgotten, for tribes can be found in every degree of ignorance, and every grade of knowledge as to pottery, as to the metals, as to the means of comfort, as to the instruments of war. And what is more, these savages have not failed from stupidity; they are, in various degrees of originality, inventive about these matters. You cannot trace the roots of an old perfect system variously maimed and variously dying; you cannot find it, as you find the trace of the Latin language in the mediæval dialects. On the contrary, you find it beginning—as new scientific discoveries and inventions now begin—here a little and there a little, the same thing half-done in various half-ways, and so as no one who knew the best way would ever have begun. An idea used to prevail that bows and arrows were the "primitive weapons"—the weapons of universal savages; but modern science has made a table,* and some savages have them and some have not, and some have substitutes of one sort and some have substitutes of another—several of these substitutes being like the "boomerang," so much more difficult to hit on or to use than the bow, as well as so much less effectual. And not only may the miscellaneous races of the world be justly described as being upon various edges of industrial civilization, approaching it by various sides, and falling short of it in various particulars, but the moment they see the real thing they know how to use it as well, or better, than civilized man. The South American uses the horse which the European brought better than the European. Many races use the rifle—the especial and very complicated weapon of civilized man—better, upon an average, than he can use it. The savage with simple tools—tools he appreciates—is like a child, quick to learn, not like an old man, who has once forgotten and who cannot acquire again. Again, if there had been an excellent aboriginal civilization in Australia and America, where, botan-

* See the very careful table and admirable discussion in Sir John Lubbock's "Pre-Historic Times."

ists and zoologists ask, are its vestiges? If these savages did care to cultivate wheat, where is the wild wheat gone which their abandoned culture must have left? If they did give up using good domestic animals, what has become of the wild ones which would, according to all natural laws, have sprung up out of them? This much is certain, that the domestic animals of Europe have, since what may be called the discovery of the *world* during the last hundred years, run up and down it. The English rat—not the pleasantest of our domestic creatures—has gone everywhere; to Australia, to New Zealand, to America: nothing but a complicated rat-miracle could ever root him out. Nor could a common force expel the horse from South America since the Spaniards took him thither; if we did not know the contrary we should suppose him a principal aboriginal animal. Where then, so to say, are the rats and horses of the primitive civilization? Not only can we not find them, but zoological science tells us that they never existed, for the "feebly pronounced," the ineffectual, marsupials of Australia and New Zealand could never have survived a competition with better creatures, such as that by which they are now perishing.

We catch then a first glimpse of patriarchal man, not with any industrial relics of a primitive civilization, but with some gradually learnt knowledge of the simpler arts, with some tamed animals and some little knowledge of the course of nature as far as it tells upon the seasons and affects the condition of simple tribes. This is what, according to ethnology, we should expect the first historic man to be, and this is what we in fact find him. But what was his mind; how are we to describe that?

I believe the general description in which Sir John Lubbock sums up his estimate of the savage mind suits the patriarchal mind. "Savages," he says, "unite the character of childhood with the passions and strength of men." And if we open the first record of the pagan world—the poems of Homer—how much do we find that suits this description better than any other. Civilization has indeed already gone forward ages beyond the time at which any such description is complete. Man, in Homer, is as good at oratory, Mr. Gladstone seems to say, as he has ever been, and, much as that means, other and better

things might be added to it. But after all, how much of the "splendid savage" there is in Achilles, and how much of the "spoiled child sulking in his tent." Impressibility and excitability are the main characteristics of the oldest Greek history, and if we turn to the east, the "simple and violent" world, as Mr. Kinglake calls it, of the first times meets us every moment.

And this is precisely what we should expect. An "inherited drill," science says, "makes modern nations what they are; their born structure bears the trace of the laws of their fathers;" but the ancient nations came into no such inheritance; they were the descendants of people who did what was right in their own eyes; they were born to no tutored habits, no preservative bonds, and therefore they were at the mercy of every impulse and blown by every passion.

The condition of the primitive man, if we conceive of him rightly, is, in several respects, different from any we know. We unconsciously assume around us the existence of a great miscellaneous social machine working to our hands, and not only supplying our wants, but even telling and deciding when those wants shall come. No one can now without difficulty conceive how people got on before there were clocks and watches; as Sir G. Lewis said, "it takes a vigorous effort of the imagination" to realize a period when it was a serious difficulty to know the hour of day. And much more is it difficult to fancy the unstable minds of such men as neither knew nature, which is the clock-work of material civilization, nor possessed a polity, which is a kind of clock-work to moral civilization. They never could have known what to expect; the whole habit of steady but varied anticipation, which makes our minds what they are, must have been wholly foreign to theirs.

Again, I at least cannot call up to myself the loose conceptions (as they must have been) of morals which then existed. If we set aside all the element derived from law and polity which runs through our current moral notions, I hardly know what we shall have left. The residuum was somehow, and in some vague way, intelligible to the ante-political man, but it must have been uncertain, wavering, and unfit to be depended upon. In the best cases it existed much as the vague feeling

of beauty now exists in minds sensitive but untaught; a still small voice of uncertain meaning; an unknown something modifying everything else, and higher than anything else, yet in form so indistinct that when you looked for it it was gone—or if this be thought the delicate fiction of a later fancy, then morality was at least to be found in the wild spasms of "wild justice," half punishment, half outrage—but anyhow, being unfixed by steady law, it was intermittent, vague, and hard for us to imagine. Everybody who has studied mathematics knows how many shadowy difficulties he seemed to have before he understood the problem, and how impossible it was when once the demonstration had flashed upon him, ever to comprehend those indistinct difficulties again, or to call up the mental confusion that admitted them. So in these days, when we cannot by any effort drive out of our minds the notion of law, we cannot imagine the mind of one who had never known it, and who could not by any effort have conceived it.

Again, the primitive man could not have imagined what we mean by a nation. We on the other hand cannot imagine those to whom it is a difficulty; "we know what it is when you do not ask us," but we cannot very quickly explain or define it. But so much as this is plain, a nation means a like body of men, because of that likeness capable of acting together, and because of that likeness inclined to obey similar rules; and even this Homer's Cyclops—used only to sparse human beings—could not have conceived.

To sum up, law—rigid, definite, concise law—is the primary want of early mankind; that which they need above anything else, that which is requisite before they can gain anything else. But it is their greatest difficulty, as well as their first requisite; the thing most out of their reach, as well as that most beneficial to them if they reach it. In later ages many races have gained much of this discipline quickly, though painfully; a loose set of scattered clans has been often and often forced to substantial settlement by a rigid conqueror; the Romans did half the work for above half Europe. But where could the first ages find Romans or a conqueror? Men conquer by the power of government, and it was exactly government which then was not. The first ascent of civilization was at a steep gradient, though when now we look down upon it, it seems almost nothing.

Part III

How the step from polity to no polity was made distinct, history does not record—on this point Sir Henry Maine has drawn a most interesting conclusion from his peculiar studies:

"It would be," he tells us, "a very simple explanation of the origin of society if we could base a general conclusion on the hint furnished us by the Scriptural example already adverted to, and could suppose that communities began to exist wherever a family held together instead of separating at the death of its patriarchal chieftain. In most of the Greek states and in Rome there long remained the vestiges of an ascending series of groups out of which the state was at first constituted. The family, house, and tribe of the Romans may be taken as a type of them, and they are so described to us that we can scarcely help conceiving them as a system of concentric circles which have gradually expanded from the same point. The elementary group is the family, connected by common subjection to the highest male ascendant. The aggregation of families forms the *gens*, or house. The aggregation of houses makes the tribe. The aggregation of tribes constitutes the commonwealth. Are we at liberty to follow these indications, and to lay down that the commonwealth is a collection of persons united by common descent from the progenitor of an original family? Of this we may at least be certain, that all ancient societies regarded themselves as having proceeded from one original stock, and even labored under an incapacity for comprehending any reason except this for their holding together in political union. The history of political ideas begins, in fact, with the assumption that kinship in blood is the sole possible ground of community in political functions; nor is there any of those subversions of feeling, which we term emphatically revolutions, so startling and so complete as the change which is accomplished when some other principle—such as that, for instance, of local contiguity—establishes itself for the first time as the basis of common political action."

If this theory were true, the origin of politics would not seem a great change, or, in early days, be really a great change. The primacy of the elder brother, in tribes casually cohesive, would be slight; it would be the beginning of much, but it

would be nothing in itself; it would be—to take an illustration from the opposite end of the political series—it would be like the headship of a weak parliamentary leader over adherents who may divide from him in a moment; it was the germ of sovereignty,—it was hardly yet sovereignty itself.

I do not myself believe that the suggestion of Sir Henry Maine—for he does not, it will be seen, offer it as a confident theory—is an adequate account of the true origin of politics. I shall in a subsequent essay show that there are, as it seems to me, abundant evidences of a time still older than that which he speaks of. But the theory of Sir Henry Maine serves my present purpose well. It describes, and truly describes, a kind of life antecedent to our present politics, and the conclusion I have drawn from it will be strengthened, not weakened, when we come to examine and deal with an age yet older, and a social bond far more rudimentary.

But when once polities were begun, there is no difficulty in explaining why they lasted. Whatever may be said against the principle of "natural selection" in other departments, there is no doubt of its predominance in early human history. The strongest killed out the weakest, as they could. And I need not pause to prove that any form of polity is more efficient than none; that an aggregate of families owning even a slippery allegiance to a single head would be sure to have the better of a set of families acknowledging no obedience to anyone, but scattering loose about the world and fighting where they stood. Homer's Cyclops would be powerless against the feeblest band; so far from its being singular that we find no other record of that state of man, so unstable and sure to perish was it that we should rather wonder at even a single vestige lasting down to the age when for picturesqueness it became valuable in poetry.

But, though the origin of polity is dubious, we are upon the *terra firma* of actual records when we speak of the preservation of polities. Perhaps every young Englishman who comes now-a-days to Aristotle or Plato is struck with their conservatism: fresh from the liberal doctrines of the present age, he wonders at finding in those recognized teachers so much contrary teaching. They both—unlike as they are—hold with Xenophon—so unlike both—that man is the "hardest of all

animals to govern." Of Plato it might indeed be plausibly said that the adherents of an intuitive philosophy, being "the tories of speculation," have commonly been prone to conservatism in government; but Aristotle, the founder of the experience philosophy, ought, according to that doctrine, to have been a liberal, if anyone ever was a liberal. In fact, both of these men lived when men had not "had time to forget" the difficulties of government. We have forgotten them altogether. We reckon, as the basis of our culture, upon an amount of order, of tacit obedience, of prescriptive governability, which these philosophers hoped to get as a principal result of their culture. We take without thought as a *datum* what they hunted as a *quæsitum*.

In early times the quantity of government is much more important than its quality. What you want is a comprehensive rule binding men together, making them do much the same things, telling them what to expect of each other—fashioning them alike, and keeping them so. What this rule is does not matter so much. A good rule is better than a bad one, but any rule is better than none; while, for reasons which a jurist will appreciate, none can be very good. But to gain that rule, what may be called the impressive elements of a polity are incomparably more important than its useful elements. How to get the obedience of men is the hard problem; what you do with that obedience is less critical.

To gain that obedience, the primary condition is the identity —not the union, but the sameness—of what we now call Church and State. Dr. Arnold, fresh from the study of Greek thought and Roman history, used to preach that this identity was the great cure for the misguided modern world. But he spoke to ears filled with other sounds and minds filled with other thoughts, and they hardly knew his meaning, much less heeded it. But though the teaching was wrong for the modern age to which it was applied, it was excellent for the old world from which it was learnt. What is there requisite is a single government—call it Church or State, as you like—regulating the whole of human life. No division of power is then endurable without danger—probably without destruction; the priest must not teach one thing and the King another; King must be priest, and prophet King: the two must say the same,

because they are the same. The idea of difference between spiritual penalties and legal penalties must never be awakened. Indeed, early Greek thought or early Roman thought would never have comprehended it. There was a kind of rough public opinion and there were rough, very rough, hands which acted on it. We now talk of political penalties and ecclesiastical prohibition, and the social censure, but they were all one then. Nothing is very like those old communities now, but perhaps a "trades union" is as near as most things; to work cheap is thought to be a "wicked" thing, and so some Broadhead puts it down.

The object of such organizations is to create what may be called a cake of custom. All the actions of life are to be submitted to a single rule for a single object; that gradually created the "hereditary drill" which science teaches to be essential, and which the early instinct of men saw to be essential, too. That this *régime* forbids free thought is not an evil; or rather, though an evil, it is the necessary basis for the greatest good; it is necessary for making the mould of civilization, and hardening the soft fibre of early man.

The first recorded history of the Aryan race shows everywhere a King, a council, and, as the necessity of early conflicts required, the King in much prominence and with much power. That there could be in such ages anything like an Oriental despotism, or a Cæsarean despotism, was impossible; the outside extra-political army which maintains them could not exist when the tribe was the nation, and when all the men in the tribe were warriors. Hence, in the time of Homer, in the first times of Rome, in the first times of ancient Germany, the King is the most visible part of the polity, because for momentary welfare he is the most useful. The close oligarchy, the patriciate, which alone could know the fixed law, alone could apply the fixed law, which was recognized as the authorized custodian of the fixed law, had then sole command over the primary social want. It alone knew the code of drill; it alone was obeyed; it alone could drill. Mr. Grote has admirably described the rise of the primitive oligarchies upon the face of the first monarchy, but perhaps because he so much loves historic Athens he has not sympathized with pre-historic

Athens. He has not shown us the need of a fixed life when all else was unfixed life.

It would be schoolboyish to explain at length how well the two great republics, the two winning republics of the ancient world, embody these conclusions. Rome and Sparta were drilling aristocracies, and succeeded because they were such. Athens was indeed of another and higher order; at least to us instructed moderns who know her and have been taught by her. But to the "Philistines" of those days Athens was of a lower order. She was beaten; she lost the great visible game which is all that short-sighted contemporaries know. She was the great "free failure" of the ancient world. She began, she announced, the good things that were to come; but she was too weak to display and enjoy them; she was trodden down by those of coarser make and better trained frame.

How much these principles are confirmed by Jewish history is obvious. There was doubtless much else in Jewish history —whole elements with which I am not here concerned. But so much is plain. The Jews were in the beginning the most unstable of nations; they were submitted to their law, and they came out the most stable of nations. Their polity was indeed defective in unity. After they asked for a King the spiritual and the secular powers (as we should speak) were never at peace, and never agreed. And the ten tribes who lapsed from their law melted away into the neighboring nations. Jeroboam has been called the "first liberal;" and, religion apart, there is a meaning in the phrase. He began to break up the binding polity which was what men wanted in that age, though eager and inventive minds always dislike it. But the Jews who adhered to their law became the Jews of the day, a nation of a firm set if ever there was one.

It is connected with this fixity that jurists tell us that the title "contract" is hardly to be discovered in the oldest law. In modern days, in civilized days, men's choice determines nearly all they do. But in early times that choice determined scarcely anything. The guiding rule was the law of status. Everybody was born to a place in the community: in that place he had to stay: in that place he found certain duties which he had to fulfil, and which were all he needed to think of. The

net of custom caught men in distinct spots, and kept each where he stood.

What are called in European politics the principles of 1789 are therefore inconsistent with the early world; they are fitted only to the new world in which society has gone through its early task; when the inherited organization is already confirmed and fixed; when the soft minds and strong passions of youthful nations are fixed and guided by hard transmitted instincts. Till then not equality before the law is necessary but inequality, for what is most wanted is an elevated *élite* who know the law: not a good government seeking the happiness of its subjects, but a dignified and overawing government getting its subjects to obey: not a good law, but a comprehensive law binding all life to one routine. Later are the ages of freedom; first are the ages of servitude. In 1789, when the great men of the Constituent Assembly looked on the long past, they hardly saw anything in it which could be praised or admired or imitated: all seemed a blunder—a complex error to be got rid of as soon as might be. But that error had made themselves. On their very physical organization the hereditary mark of old times was fixed; their brains were hardened and their nerves were steadied by the transmitted results of tedious usages. The ages of monotony had their use, for they trained men for ages when they need not be monotonous.

Part IV

But even yet we have not realized the full benefit of those early polities and those early laws. They not only "bound up" men in groups, not only impressed on men a certain set of common usages, but often, at least in an indirect way, suggested, if I may use the expression, national character.

We cannot yet explain—I am sure, at least, I cannot attempt to explain—all the singular phenomena of national character: how completely and perfectly they seem to be at first framed; how slowly, how gradually they can alone be altered, if they can be altered at all. But there is one analogous fact which may help us to see, at least dimly, how such phenomena are caused. There is a character of ages, as well as of nations; and as we have full histories of many such periods, we can

examine exactly when and how the mental peculiarity of each began, and also exactly when and how that mental peculiarity passed away. We have an idea of Queen Anne's time, for example, or of Queen Elizabeth's time, or George II's time; or again of the age of Louis XIV, or Louis XV, or the French Revolution; an idea more or less accurate in proportion as we study, but probably even in the minds who know these ages best and most minutely, more special, more simple, more unique than the truth was. We throw aside too much, in making up our images of eras, that which is common to all eras. The English character was much the same in many great respects in Chaucer's time as it was in Elizabeth's time or Anne's time, or as it is now. But some qualities were added to this common element in one era and some in another; some qualities seemed to overshadow and eclipse it in one era, and others in another. We overlook and half forget the constant while we see and watch the variable. But—for that is the present point—why is there this variable? Everyone must, I think, have been puzzled about it. Suddenly, in a quiet time —say, in Queen Anne's time—arises a special literature, a marked variety of human expression, pervading what is then written and peculiar to it: surely this is singular.

The true explanation is, I think, something like this. One considerable writer gets a sort of start because what he writes is somewhat more—only a little more very often, as I believe —congenial to the minds around him than any other sort. This writer is very often not the one whom posterity remembers —not the one who carries the style of the age farthest towards its ideal type, and gives it its charm and its perfection. It was not Addison who began the essay-writing of Queen Anne's time, but Steele; it was the vigorous forward man who struck out the rough notion, though it was the wise and meditative man who improved upon it and elaborated it, and whom posterity reads. Some strong writer, or group of writers, thus seize on the public mind, and a curious process soon assimilates other writers in appearance to them. To some extent, no doubt, this assimilation is effected by a process most intelligible, and not at all curious—the process of conscious imitation; A sees that B's style of writing answers, and he imitates it. But definitely aimed mimicry like this is always rare; original men

who like their own thoughts do not willingly clothe them in words they feel they borrow. No man, indeed, can think to much purpose when he is studying to write a style not his own. After all, very few men are at all equal to the steady labor, the stupid and mistaken labor mostly, of making a style. Most men catch the words that are in the air, and the rhythm which comes to them they do not know from whence; an unconscious imitation determines their words, and makes them say what of themselves they would never have thought of saying. Everyone who has written in more than one newspaper knows how invariably his style catches the tone of each paper while he is writing for it, and changes to the tone of another when in turn he begins to write for that. He probably would rather write the traditional style to which the readers of the journal are used, but he does not set himself to copy it; he would have to force himself in order not to write it if that was what he wanted. Exactly in this way, just as a writer for a journal without a distinctly framed purpose gives the readers of the journal the sort of words and the sort of thoughts they are used to—so, on a larger scale, the writers of an age, without thinking of it, give to the readers of the age the sort of words and the sort of thoughts—the special literature, in fact—which those readers like and prize. And not only does the writer, without thinking, choose the sort of style and meaning which are most in vogue, but the writer is himself chosen. A writer does not begin to write in the traditional rhythm of an age unless he feels, or fancies he feels, a sort of aptitude for writing it, any more than a writer tries to write in a journal in which the style is uncongenial or impossible to him. Indeed, if he mistakes he is soon weeded out; the editor rejects, the age will not read his compositions. How painfully this traditional style cramps great writers whom it happens not to suit is curiously seen in Wordsworth, who was bold enough to break through it, and, at the risk of contemporary neglect, to frame a style of his own. But he did so knowingly, and he did so with an effort. "It is supposed," he says, "that by the act of writing in verse an author makes a formal engagement that he will gratify certain known habits of association; that he not only then apprises the reader that certain classes of ideas and expressions will be found in his book, but that others will be carefully eschewed.

The exponent or symbol held forth by metrical language must, in different ages of literature, have excited very different expectations; for example, in the age of Catullus, Terence, or Lucretius, and that of Statius or Claudian; and in our own country, in the age of Shakespeare and Beaumont and Fletcher, and that of Donne and Cowley, or Pope." And then, in a kind of vexed way, Wordsworth goes on to explain that he himself can't and won't do what is expected from him, but that he will write his own words, and only his own words. A strict, I was going to say a Puritan, genius will act thus, but most men of genius are susceptible and versatile, and fall into the style of their age. One very unapt at the assimilating process, but on that account the more curious about it, says:—

> "How we
> Track a livelong day, great heaven, and watch our shadows!
> What our shadows seem, forsooth, we will ourselves be.
> Do I look like that? You think me that: then I *am* that."

What writers are expected to write, they write; or else they do not write at all; but, like the writer of these lines, stop discouraged, live disheartened, and die leaving fragments which their friends treasure, but which a rushing world never heeds. The nonconformist writers are neglected, the conformist writers are encouraged, until perhaps on a sudden the fashion shifts. And as with the writers, so in a less degree with readers. Many men—most men—get to like or think they like that which is ever before them, and which those around them like, and which received opinion says they ought to like; or if their minds are too marked and oddly made to get into the mould, they give up reading altogether, or read old books and foreign books, formed under another code and appealing to a different taste. The principle of "elimination," the "use and disuse" of organs which naturalists speak of, works here. What is used strengthens; what is disused weakens: "to those who have, more is given;" and so a sort of style settles upon an age, and imprinting itself more than anything else in men's memories becomes all that is thought of about it.

I believe that what we call national character arose in very much the same way. At first a sort of "chance predominance" made a model, and then invincible attraction, the

necessity which rules all but the strongest men to imitate what is before their eyes, and to be what they are expected to be, moulded men by that model. This is, I think, the very process by which new national characters are being made in our own time. In America and in Australia a new modification of what we call Anglo-Saxonism is growing. A sort of type of character arose from the difficulties of colonial life—the difficulty of struggling with the wilderness; and this type has given its shape to the mass of characters because the mass of characters have unconsciously imitated it. Many of the American characteristics are plainly useful in such a life, and consequent on such a life. The eager restlessness, the highly strung nervous organization, are useful in continual struggle, and also are promoted by it. These traits seem to be arising in Australia, too, and wherever else the English race is placed in like circumstances. But even in these useful particulars the innate tendency of the human mind to become like what is around it, has effected much; a sluggish Englishman will often catch the eager American look in a few years; an Irishman or even a German will catch it, too, even in all English particulars. And as to a hundred minor points—in so many that go to mark the typical Yankee—usefulness has had no share either in their origin or their propagation. The accident of some predominant person possessing them set the fashion, and it has been imitated to this day. Anybody who inquires will find even in England, and even in these days of assimilation, parish peculiarities which arose, no doubt, from some old accident, and have been heedfully preserved by customary copying. A national character is but the successful parish character; just as the national speech is but the successful parish dialect, the dialect, that is, of the district which came to be more—in many cases but a little more—influential than other districts, and so set its yoke on books and on society.

I could enlarge much on this, for I believe this unconscious imitation to be the principal force in the making of national characters; but I have already said more about it than I need. Everybody who weighs even half these arguments will admit that it is a great force in the matter, a principal agency to be acknowledged and watched; and for my present purpose I want no more. I have only to show the efficacy of the tight early

polity (so to speak) and the strict early law on the creation of corporate characters. These settled the predominant type, set up a sort of model, made a sort of idol; this was worshipped, copied, and observed, from all manner of mingled feelings, but most of all because it was the "thing to do," the then accepted form of human action. When once the predominant type was determined, the copying propensity of man did the rest. The tradition ascribing Spartan legislation to Lycurgus was literally untrue, but its spirit was quite true. In the origin of states strong and eager individuals got hold of small knots of men, and made for them a fashion which they were attached to and kept.

It is only after duly apprehending the silent manner in which national characters thus form themselves, that we can rightly appreciate the dislike which old Governments had to trade. There must have been something peculiar about it, for the best philosophers, Plato and Aristotle, shared it. They regarded commerce as the source of corruption as naturally as a modern economist considers it the spring of industry, and all the old Governments acted in this respect upon the philosophers' maxims. "Well," said Dr. Arnold, speaking ironically and in the spirit of modern times—"Well, indeed, might the policy of the old priest-nobles of Egypt and India endeavor to divert their people from becoming familiar with the sea, and represent the occupation of a seaman as incompatible with the purity of the highest castes. The sea deserved to be hated by the old aristocracies, inasmuch as it has been the mightiest instrument in the civilization of mankind." But the old oligarchies had their own work, as we now know. They were imposing a fashioning yoke; they were making the human nature which after times employ. They were at their labors; we have entered into these labors. And to the unconscious imitation which was their principal tool, no impediment was so formidable as foreign intercourse. Men imitate what is before their eyes, if it is before their eyes alone, but they do not imitate it if it is only one among many present things—one competitor among others, all of which are equal and some of which seem better. "Whoever speaks two languages is a rascal," says the saying, and it rightly represents the feeling of primitive communities when the sudden impact of new thoughts and

new examples breaks down the compact despotism of the single consecrated code, and leaves pliant and impressible man —such as he then is—to follow his unpleasant will without distinct guidance by hereditary morality and hereditary religion. The old oligarchies wanted to keep their type perfect, and for that end they were right not to allow foreigners to touch it.

" Distinctions of race," says Arnold himself elsewhere in a remarkable essay—for it was his last on Greek history, his farewell words on a long favorite subject—" were not of that odious and fantastic character which they have been in modern times; they implied real differences of the most important kind, religious and moral." And after exemplifying this at length he goes on, " It is not then to be wondered at that Thucydides, when speaking of a city founded jointly by Ionians and Dorians, should have thought it right to add 'that the prevailing institutions of the two were Ionian,' for according as they were derived from one or the other the prevailing type would be different. And therefore the mixture of persons of different race in the same commonwealth, unless one race had a complete ascendancy, tended to confuse all the relations of human life, and all men's notions of right and wrong; or by compelling men to tolerate in so near a relation as that of fellow-citizens' differences upon the main points of human life, led to a general carelessness and scepticism, and encouraged the notion that right and wrong had no real existence, but were mere creatures of human opinion." But if this be so, the oligarchies were right. Commerce brings this mingling of ideas, this breaking down of old creeds, and brings it inevitably. It is now-a-days its greatest good that it does so; the change is what we call " enlargement of mind." But in early times Providence " set apart the nations;" and it is not till the frame of their morals is set by long ages of transmitted discipline, that such enlargement can be borne. The ages of isolation had their use, for they trained men for ages when they were not to be isolated.

CHAPTER II

THE USE OF CONFLICT

Part I

THE difference between progression and stationary inaction," says one of our greatest living writers, " is one of the great secrets which science has yet to penetrate." I am sure I do not pretend that I can completely penetrate it; but it undoubtedly seems to me that the problem is on the verge of solution, and that scientific successes in kindred fields by analogy suggest some principles which wholly remove many of its difficulties, and indicate the sort of way in which those which remain may hereafter be removed too.

But what is the problem? Common English, I might perhaps say common civilized thought, ignores it. Our habitual instructors, our ordinary conversation, our inevitable and ineradicable prejudices, tend to make us think that " Progress " is the normal fact in human society, the fact which we should expect to see, the fact which we should be surprised if we did not see. But history refutes this. The ancients had no conception of progress; they did not so much as reject the idea; they did not even entertain the idea. Oriental nations are just the same now. Since history began they have always been what they are. Savages, again, do not improve; they hardly seem to have the basis on which to build, much less the material to put up anything worth having. Only a few nations, and those of European origin, advance; and yet these think—seem irresistibly compelled to think—such advance to be inevitable, natural, and eternal. Why then is this great contrast?

Before we can answer, we must investigate more accurately. No doubt history shows that most nations are stationary now; but it affords reason to think that all nations once advanced.

Their progress was arrested at various points; but nowhere, probably not even in the hill tribes of India, not even in the Andaman Islanders, not even in the savages of Terra del Fuego, do we find men who have not got some way. They have made their little progress in a hundred different ways; they have framed with infinite assiduity a hundred curious habits; they have, so to say, screwed themselves into the uncomfortable corners of a complex life, which is odd and dreary, but yet is possible. And the corners are never the same in any two parts of the world. Our record begins with a thousand unchanging edifices, but it shows traces of previous building. In historic times there has been little progress; in pre-historic times there must have been much.

In solving, or trying to solve, the question, we must take notice of this remarkable difference, and explain it, too, or else we may be sure our principles are utterly incomplete, and perhaps altogether unsound. But what then is that solution, or what are the principles which tends towards it? Three laws, or approximate laws, may, I think, be laid down, with only one of which I can deal in this paper, but all three of which it will be best to state, that it may be seen what I am aiming at.

First. In every particular state of the world, those nations which are strongest tend to prevail over the others; and in certain marked peculiarities the strongest tend to be the best.

Secondly. Within every particular nation the type or types of character then and there most attractive tend to prevail; and the most attractive, though with exceptions, is what we call the best character.

Thirdly. Neither of these competitions is in most historic conditions intensified by extrinsic forces, but in some conditions, such as those now prevailing in the most influential part of the world, both are so intensified.

These are the sort of doctrines with which, under the name of "natural selection" in physical science, we have become familiar; and as every great scientific conception tends to advance its boundaries and to be of use in solving problems not thought of when it was started, so here, what was put forward for mere animal history may, with a change of form, but an identical essence, be applied to human history.

At first some objection was raised to the principle of "nat-

ural selection" in physical science upon religious grounds; it was to be expected that so active an idea and so large a shifting of thought would seem to imperil much which men valued. But in this, as in other cases, the objection is, I think, passing away; the new principle is more seen to be fatal to mere outworks of religion, not to religion itself. At all events, to the sort of application here made of it, which only amounts to searching out and following up an analogy suggested by it, there is plainly no objection. Everyone now admits that human history is guided by certain laws, and all that is here aimed at is to indicate, in a more or less distinct way an infinitesimally small portion of such laws.

The discussion of these three principles cannot be kept quite apart except by pedantry; but it is almost exclusively with the first—that of the competition between nation and nation, or tribe and tribe (for I must use these words in their largest sense, and so as to include every cohering aggregate of human beings)—that I can deal now; and even as to that I can but set down a few principal considerations.

The progress of the military art is the most conspicuous, I was about to say the most showy, fact in human history. Ancient civilization may be compared with modern in many respects, and plausible arguments constructed to show that it is better; but you cannot compare the two in military power. Napoleon could indisputably have conquered Alexander; our Indian army would not think much of the Retreat of the Ten Thousand. And I suppose the improvement has been continuous: I have not the slightest pretence to special knowledge; but, looking at the mere surface of the facts, it seems likely that the aggregate battle array, so to say, of mankind, the fighting force of the human race, has constantly and invariably grown. It is true that the ancient civilization long resisted the "barbarians," and was then destroyed by the barbarians. But the barbarians had improved. "By degrees," says a most accomplished writer,* "barbarian mercenaries came to form the largest, or at least the most effective, part of the Roman armies. The body-guard of Augustus had been so composed; the pretorians were generally selected from the bravest frontier troops, most of them Germans." "Thus," he continues, "in many ways was the old antagonism broken

* Mr. Bryce.

down, Romans admitting barbarians to rank and office; barbarians catching something of the manners and culture of their neighbors. And thus, when the final movement came, the Teutonic tribes slowly established themselves through the provinces, knowing something of the system to which they came, and not unwilling to be considered its members." Taking friend and foe together, it may be doubted whether the fighting capacity of the two armies was not as great at last, when the Empire fell, as ever it was in the long period while the Empire prevailed. During the Middle Ages the combining power of men often failed; in a divided time you cannot collect as many soldiers as in a concentrated time. But this difficulty is political, not military. If you added up the many little hosts of any century of separation, they would perhaps be found equal or greater than the single host, or the fewer hosts, of previous centuries which were more united. Taken as a whole, and allowing for possible exceptions, the aggregate fighting power of mankind has grown immensely, and has been growing continuously since we knew anything about it.

Again, this force has tended to concentrate itself more and more in certain groups which we call "civilized nations." The *literati* of the last century were forever in fear of a new conquest of the barbarians, but only because their imagination was overshadowed and frightened by the old conquests. A very little consideration would have shown them that, since the monopoly of military inventions by cultivated states, real and effective military power tends to confine itself to those states. The barbarians are no longer so much as vanquished competitors; they have ceased to compete at all.

The military vices, too, of civilization seem to decline just as its military strength augments. Somehow or other civilization does not make men effeminate or unwarlike now as it once did. There is an improvement in our fibre—moral, if not physical. In ancient times city people could not be got to fight —seemingly could not fight; they lost their mental courage, perhaps their bodily nerve. But now-a-days in all countries the great cities could pour out multitudes wanting nothing but practice to make good soldiers, and abounding in bravery and vigor. This was so in America; it was so in Prussia; and it would be so in England too. The breed of ancient times was

impaired for war by trade and luxury, but the modern breed is not so impaired.

A curious fact indicates the same thing probably, if not certainly. Savages waste away before modern civilization; they seem to have held their ground before the ancient. There is no lament in any classical writer for the barbarians. The New Zealanders say that the land will depart from their children; the Australians are vanishing; the Tasmanians have vanished. If anything like this had happened in antiquity, the classical moralists would have been sure to muse over it; for it is just the large solemn kind of fact that suited them. On the contrary, in Gaul, in Spain, in Sicily—everywhere that we know of—the barbarian endured the contact of the Roman, and the Roman allied himself to the barbarian. Modern science explains the wasting away of savage men; it says that we have diseases which we can bear, though they cannot, and that they die away before them as our fatted and protected cattle died out before the rinderpest, which is innocuous, in comparison, to the hardy cattle of the steppes. Savages in the first year of the Christian era were pretty much what they were in the eighteen-hundredth; and if they stood the contact of ancient civilized men, and cannot stand ours, it follows that our race is presumably tougher than the ancient; for we have to bear, and do bear, the seeds of greater diseases than those the ancients carried with them. We may use, perhaps, the unvarying savage as a metre to gauge the vigor of the constitutions to whose contact he is exposed.

Particular consequences may be dubious, but as to the main fact there is no doubt: the military strength of man has been growing from the earliest time known to our history, straight on till now. And we must not look at times known by written records only; we must travel back to older ages, known to us only by what lawyers call real evidence—the evidence of things. Before history began, there was at least as much progress in the military art as there has been since. The Roman legionaries or Homeric Greeks were about as superior to the men of the shell mounds and the flint implements as we are superior to them. There has been a constant acquisition of military strength by man since we know anything of him, either by the documents he has composed or the indications he has left.

The cause of this military growth is very plain. The strongest nation has always been conquering the weaker; sometimes even subduing it, but always prevailing over it. Every intellectual gain, so to speak, that a nation possessed was in the earliest times made use of—was invested and taken out—in war; all else perished. Each nation tried constantly to be the stronger, and so made or copied the best weapons; by conscious and unconscious imitation each nation formed a type of character suitable to war and conquest. Conquest improved mankind by the intermixture of strength; the armed truce, which was then called peace, improved them by the competition of training and the consequent creation of new power. Since the long-headed men first drove the short-headed men out of the best land in Europe, all European history has been the history of the superposition of the more military races over the less military—of the efforts, sometimes successful, sometimes unsuccessful, of each race to get more military; and so the art of war has constantly improved.

But why is one nation stronger than another? In the answer to that, I believe, lies the key to the principal progress of early civilization, and to some of the progress of all civilization. The answer is that there are very advantages—some small and some great—every one of which tends to make the nation which has it superior to the nation which has it not; that many of these advantages can be imparted to subjugated races, or imitated by competing races; and that, though some of these advantages may be perishable or inimitable, yet, on the whole, the energy of civilization grows by the coalescence of strengths and by the competition of strengths.

Part II

By far the greatest advantage is that on which I observed before—that to which I drew all the attention I was able by making the first of these essays an essay on the Preliminary Age. The first thing to acquire is, if I may so express it, the legal fibre; a polity first—what sort of polity is immaterial; a law first—what kind of law is secondary; a person or set of persons to pay deference to—though who he is, or they are, by comparison scarcely signifies.

"There is," it has been said, "hardly any exaggerating the

difference between civilized and uncivilized men; it is greater than the difference between a tame and a wild animal," because man can improve more. But the difference at first was gained in much the same way. The taming of animals as it now goes on among savage nations, and as travellers who have seen it describe it, is a kind of selection. The most wild are killed when food is wanted, and the most tame and easy to manage kept, because they are more agreeable to human indolence, and so the keeper likes them best. Captain Galton, who has often seen strange scenes of savage and of animal life, had better describe the process:—"The irreclaimably wild members of every flock would escape and be utterly lost; the wilder of those that remained would assuredly be selected for slaughter whenever it was necessary that one of the flock should be killed. The tamest cattle—those which seldom ran away, that kept the flocks together, and those which led them homeward—would be preserved alive longer than any of the others. It is, therefore, these that chiefly become the parents of stock and bequeath their domestic aptitudes to the future herd. I have constantly witnessed this process of selection among the pastoral savages of South Africa. I believe it to be a very important one on account of its rigor and its regularity. It must have existed from the earliest times, and have been in continuous operation, generation after generation, down to the present day." *

Man, being the strongest of all animals, differs from the rest; he was obliged to be his own domesticator; he had to tame himself. And the way in which it happened was, that the most obedient, the tamest tribes are, at the first stage in the real struggle of life, the strongest and the conquerors. All are very wild then; the animal vigor, the savage virtue of the race has died out in none, and all have enough of it. But what makes one tribe—one incipient tribe, one bit of a tribe—to differ from another is their relative faculty of coherence. The slightest symptom of legal development, the least indication of a military bond, is then enough to turn the scale. The compact tribes win, and the compact tribes are the tamest. Civilization begins, because the beginning of civilization is a military advantage.

* Ethnological Society's Transactions, vol. iii. p. 137.

Probably if we had historic records of the ante-historic ages —if some superhuman power had set down the thoughts and actions of men ages before they could set them down for themselves—we should know that this first step in civilization was the hardest step. But when we come to history as it is, we are more struck with the difficulty of the next step. All the absolutely incoherent men—all the "Cyclops"—have been cleared away long before there was an authentic account of them. And the least coherent only remain in the "protected" parts of the world, as we may call them. Ordinary civilization begins near the Mediterranean Sea; the best, doubtless, of the ante-historic civilizations were not far off. From this centre the conquering swarm—for such it is—has grown and grown; has widened its subject territories steadily, though not equably, age by age. But geography long defied it. An Atlantic Ocean, a Pacific Ocean, an Australian Ocean, an unapproachable interior Africa, an inaccessible and undesirable hill India, were beyond its range. In such remote places there was no real competition, and on them inferior half-combined men continued to exist. But in the regions of rivalry—the regions where the better man pressed upon the worse man —such half-made associations could not last. They died out, and history did not begin till after they were gone. The great difficulty which history records is not that of the first step, but that of the second step. What is most evident is not the difficulty of getting a fixed law, but getting out of a fixed law; not of cementing (as upon a former occasion I phrased it) a cake of custom, but of breaking the cake of custom; not of making the first preservative habit, but of breaking through it, and reaching something better.

This is the precise case with the whole family of arrested civilizations. A large part, a very large part, of the world seems to be ready to advance to something good—to have prepared all the means to advance to something good,—and then to have stopped, and not advanced. India, Japan, China, almost every sort of Oriental civilization, though differing in nearly all other things, are in this alike. They look as if they had paused when there was no reason for pausing—when a mere observer from without would say they were likely not to pause.

The reason is that only those nations can progress which preserve and use the fundamental peculiarity which was given by nature to man's organism as to all other organisms. By law of which we know no reason, but which is among the first by which Providence guides and governs the world, there is a tendency in descendants to be like their progenitors, and yet a tendency also in descendants to differ from their progenitors. The work of nature in making generations is a patchwork—part resemblance, part contrast. In certain respects each born generation is not like the last born; and in certain other respects it is like the last. But the peculiarity of arrested civilization is to kill out varieties at birth almost; that is, in early childhood, and before they can develop. The fixed custom which public opinion alone tolerates is imposed on all minds, whether it suits them or not. In that case the community feel that this custom is the only shelter from bare tyranny, and the only security for what they value. Most Oriental communities live on land which in theory is the property of a despotic sovereign, and neither they nor their families could have the elements of decent existence unless they held the land upon some sort of fixed terms. Land in that state of society is (for all but a petty skilled minority) a necessary of life, and all the unincreasable land being occupied, a man who is turned out of his holding is turned out of this world, and must die. And our notion of written leases is as out of place in a world without writing and without reading as a House of Commons among Andaman Islanders. Only one check, one sole shield for life and good, is then possible—usage. And it is but too plain how in such places and periods men cling to customs because customs alone stand between them and starvation.

A still more powerful cause co-operated, if a cause more powerful can be imagined. Dryden had a dream of an early age, "when wild in woods the noble savage ran;" but "when lone in woods the cringing savage crept" would have been more like all we know of that early, bare, painful period. Not only had they no comfort, no convenience, not the very beginnings of an epicurean life, but their mind within was as painful to them as the world without. It was full of fear. So far as the vestiges inform us, they were afraid of everything;

they were afraid of animals, of certain attacks by near tribes, and of possible inroads from far tribes. But, above all things, they were frightened of "the world;" the spectacle of nature filled them with awe and dread. They fancied there were powers behind it which must be pleased, soothed, flattered, and this very often in a number of hideous ways. We have too many such religions, even among races of great cultivation. Men change their religions more slowly than they change anything else: and accordingly we have religions "of the ages"—(it is Mr. Jowett who so calls them)—of the "ages before morality;" of ages of which the civil life, the common maxims, and all the secular thoughts have long been dead. "Every reader of the classics," said Dr. Johnson, "finds their mythology tedious." In that old world, which is so like our modern world in so many things, so much more like than many far more recent, or some that live beside us, there is a part in which we seem to have no kindred, which we stare at, of which we cannot think how it could be credible, or how it came to be thought of. This is the archaic part of that very world which we look at as so ancient; an "antiquity" which descended to them, hardly altered, perhaps, from times long antecedent, which were as unintelligible to them as to us, or more so. How this terrible religion—for such it was in all living detail, though we make, and the ancients then made, an artistic use of the more attractive bits of it—weighed on man, the great poem of Lucretius, the most of a nineteenth century poem of any in antiquity, brings before us with a feeling so vivid as to be almost a feeling of our own. Yet the classical religion is a mild and tender specimen of the preserved religions. To get at the worst, you should look where the destroying competition has been least—at America, where sectional civilization was rare, and a pervading coercive civilization did not exist; at such religions as those of the Aztecs.

At first sight it seems impossible to imagine what conceivable function such awful religions can perform in the economy of the world. And no one can fully explain them. But one use they assuredly had: they fixed the yoke of custom thoroughly on mankind. They were the prime agents of the era. They put upon a fixed law a sanction so fearful that no one could dream of not conforming to it.

No one will ever comprehend the arrested civilizations unless he sees the strict dilemma of early society. Either men had no law at all, and lived in confused tribes, hardly hanging together, or they had to obtain a fixed law by processes of incredible difficulty. Those who surmounted that difficulty soon destroyed all those that lay in their way who did not. And then they themselves were caught in their own yoke. The customary discipline, which could only be imposed on any early men by terrible sanctions, continued with those sanctions, and killed out of the whole society the propensities to variation which are the principle of progress.

Experience shows how incredibly difficult it is to get men really to encourage the principle of originality. They will admit it in theory, but in practice the old error—the error which arrested a hundred civilizations—returns again. Men are too fond of their own life, too credulous of the completeness of their own ideas, too angry at the pain of new thoughts, to be able to bear easily with a changing existence; or else, having new ideas, they want to enforce them on mankind—to make them heard, and admitted, and obeyed before, in simple competition with other ideas, they would ever be so naturally. At this very moment there are the most rigid Comtists teaching that we ought to be governed by a hierarchy—a combination of *savans* orthodox in science. Yet who can doubt that Comte would have been hanged by his own hierarchy; that his *essor matériel*, which was in fact troubled by the "theologians and metaphysicians" of the Polytechnic School, would have been more impeded by the government he wanted to make? And then the secular Comtists, Mr. Harrison and Mr. Beesly, who want to "Frenchify the English institutions"—that is, to introduce here an imitation of the Napoleonic system, a dictatorship founded on the proletariat—who can doubt that if both these clever writers had been real Frenchmen they would have been irascible anti-Bonapartists, and have been sent to Cayenne long ere now? The wish of these writers is very natural. They want to "organize society," to erect a despot who will do what they like, and work out their ideas; but any despot will do what he himself likes, and will root out new ideas ninety-nine times for once that he introduces them.

Again, side by side with these Comtists, and warring with

them—at least with one of them—is Mr. Arnold, whose poems we know by heart, and who has, as much as any living Englishman, the genuine literary impulse; and yet even he wants to put a yoke upon us—and, worse than a political yoke, an academic yoke, a yoke upon our minds and our styles. He, too, asks us to imitate France; and what else can we say than what the two most thorough Frenchmen of the last age did say?—"*Dans les corps à talent, nulle distinction ne fait ombrage, si ce n'est pas celle du talent. Un duc et pair honore l'Académie Française, qui ne veut point de Boileau, refuse la Bruyère, fait attendre Voltaire, mais reçoit tout d'abord Chapelain et Conrart. De même nous voyons à l'Académie Grecque le vicomte invité, Coraï repoussé, lorsque Jormard y entre comme dans un moulin.*" Thus speaks Paul-Louis Courier in his own brief inimitable prose. And a still greater writer—a real Frenchman, if ever there was one, and (what many critics would have denied to be possible) a great poet by reason of his most French characteristics—Béranger, tells us in verse:—

"Je croyais voir le président
Faire bâiller—en répondant
Que l'on vient de perdre un grand homme;
Que moi je le vaux, Dieu sait comme.
Mais ce président sans façon *
Ne pérore ici qu'en chanson:
Toujours trop tôt sa harangue est finie.
Non, non, ce n'est point comme à l'Académie,
Ce n'est point comme à l'Académie.

"Admis enfin, aurai-je alors,
Pour tout esprit, l'esprit de corps?
Il rend le bon sens, quoi qu'on dise,
Solidaire de la sottise;
Mais, dans votre société,
L'esprit de corps, c'est la gaité.
Cet esprit là règne sans tyrannie.
Non, non, ce n'est point comme à l'Académie;
Ce n'est point comme à l'Académie."

Asylums of common-place, he hints, academies must ever be. But that sentence is too harsh; the true one is—the academies are asylums of the ideas and the tastes of the last age. "By the time," I have heard a most eminent man of sci-

* Désaugiers.

ence observe, " by the time a man of science attains eminence on any subject, he becomes a nuisance upon it, because he is sure to retain errors which were in vogue when he was young, but which the new race have refuted." These are the sort of ideas which find their home in academies, and out of their dignified windows pooh-pooh new things.

I may seem to have wandered far from early society, but I have not wandered. The true scientific method is to explain the past by the present—what we see by what we do not see. We can only comprehend why so many nations have not varied, when we see how hateful variation is; how everybody turns against it; how not only the conservatives of speculation try to root it out, but the very innovators invent most rigid machines for crushing the " monstrosities and anomalies "—the new forms, out of which, by competition and trial, the best is to be selected for the future. The point I am bringing out is simple:—one most important prerequisite of a prevailing nation is that it should have passed out of the first stage of civilization into the second stage—out of the stage where permanence is most wanted into that where variability is most wanted; and you cannot comprehend why progress is so slow till you see how hard the most obstinate tendencies of human nature make that step to mankind.

Of course the nation we are supposing must keep the virtues of its first stage as it passes into the after stage, else it will be trodden out; it will have lost the savage virtues in getting the beginning of the civilized virtues; and the savage virtues which tend to war are the daily bread of human nature. Carlyle said, in his graphic way, " The ultimate question between every two human beings is, ' Can I kill thee, or canst thou kill me?' " History is strewn with the wrecks of nations which have gained a little progressiveness at the cost of a great deal of hard manliness, and have thus prepared themselves for destruction as soon as the movements of the world gave a chance for it. But these nations have come out of the " pre-economic stage " too soon; they have been put to learn while yet only too apt to unlearn. Such cases do not vitiate, they confirm, the principle—that a nation which has just gained variability without losing legality has a singular likelihood to be a prevalent nation.

No nation admits of an abstract definition; all nations are beings of many qualities and many sides; no historical event exactly illustrates any one principle; every cause is intertwined and surrounded with a hundred others. The best history is but like the art of Rembrandt; it casts a vivid light on certain selected causes, on those which were best and greatest; it leaves all the rest in shadow and unseen. To make a single nation illustrate a principle, you must exaggerate much and you must omit much. But, not forgetting this caution, did not Rome—the prevalent nation in the ancient world—gain her predominance by the principle on which I have dwelt? In the thick crust of her legality there was hidden a little seed of adaptiveness. Even in her law itself no one can fail to see that, binding as was the habit of obedience, coercive as use and wont at first seem, a hidden impulse of extrication did manage, in some queer way, to change the substance while conforming to the accidents—to do what was wanted for the new time while seeming to do only what was directed by the old time. And the moral of their whole history is the same: each Roman generation, so far as we know, differs a little—and in the best times often but a very little—from its predecessors. And, therefore, the history is so continuous as it goes, though its two ends are so unlike. The history of many nations is like the stage of the English drama: one scene is succeeded on a sudden by a scene quite different,—a cottage by a palace, and a windmill by a fortress. But the history of Rome changes as a good diorama changes; while you look, you hardly see it alter; each moment is hardly different from the last moment; yet at the close the metamorphosis is complete, and scarcely anything is as it began. Just so in the history of the great prevailing city: you begin with a town and you end with an empire, and this by unmarked stages. So shrouded, so shielded, in the coarse fibre of other qualities was the delicate principle of progress, that it never failed, and it was never broken.

One standing instance, no doubt, shows that the union of progressiveness and legality does not secure supremacy in war. The Jewish nation has its type of progress in the prophets, side by side with its type of permanence in the law and Levites, more distinct than any other ancient people. Nowhere in common history do we see the two forces—both so necessary and

both so dangerous—so apart and so intense: Judæa changed in inward thought, just as Rome changed in exterior power. Each change was continuous, gradual, and good. In early times every sort of advantage tends to become a military advantage; such is the best way, then, to keep it alive. But the Jewish advantage never did so; beginning in religion, contrary to a thousand analogies, it remained religious. For that we care for them; from that have issued endless consequences. But I cannot deal with such matters here, nor are they to my purpose. As respects this essay, Judæa is an example of combined variability and legality not investing itself in warlike power, and so perishing at last, but bequeathing nevertheless a legacy of the combination in imperishable mental effects.

It may be objected that this principle is like saying that men walk when they do walk, and sit when they do sit. The problem is, why do men progress? And the answer suggested seems to be that they progress when they have a certain sufficient amount of variability in their nature. This seems to be the old style of explanation by occult qualities. It seems like saying that opium sends men to sleep because it has a soporific virtue, and bread feeds because it has an alimentary quality. But the explanation is not so absurd. It says: "The beginning of civilization is marked by an intense legality; that legality is the very condition of its existence, the bond which ties it together; but that legality—that tendency to impose a settled customary yoke upon all men and all actions—if it goes on, kills out the variability implanted by nature, and makes different men and different ages fac-similes of other men and other ages, as we see them so often. Progress is only possible in those happy cases where the force of legality has gone far enough to bind the nation together, but not far enough to kill out all varieties and destroy nature's perpetual tendency to change." The point of the solution is not the invention of an imaginary agency, but an assignment of comparative magnitude to two known agencies.

Part III

This advantage is one of the greatest in early civilization—one of the facts which give a decisive turn to the battle of nations; but there are many others. A little perfection in political institutions may do it. Travellers have noticed that among savage tribes those seemed to answer best in which the monarchical power was most predominant, and those worst in which the "rule of many" was in its vigor. So long as war is the main business of nations, temporary despotism—despotism during the campaign—is indispensable. Macaulay justly said that many an army has prospered under a bad commander, but no army has ever prospered under a "debating society;" that many-headed monster is then fatal. Despotism grows in the first societies, just as democracy grows in more modern societies; it is the government answering the primary need, and congenial to the whole spirit of the time. But despotism is unfavorable to the principle of variability, as all history shows. It tends to keep men in the customary stage of civilization; its very fitness for that age unfits it for the next. It prevents men from passing into the first age of progress—the very slow and very gradually improving age. Some "standing system" of semi-free discussion is as necessary to break the thick crust of custom and begin progress as it is in later ages to carry on progress when begun; probably it is even more necessary. And in the most progressive races we find it. I have spoken already of the Jewish prophets, the life of that nation, and the principle of all its growth. But a still more progressive race—that by which secular civilization was once created, by which it is now mainly administered—had a still better instrument of progression. "In the very earliest glimpses," says Mr. Freeman, "of Teutonic political life we find the monarchic, the aristocratic, and the democratic elements already clearly marked. There are leaders with or without the royal title; there are men of noble birth, whose noble birth (in whatever the original nobility may have consisted) entitles them to a pre-eminence in every way; but beyond these there is a free and armed people, in whom it is clear that the ultimate sovereignty resides. Small matters are decided by the chiefs alone; great matters are submitted by the chiefs to the assembled nation.

Such a system is far more than Teutonic; it is a common Aryan possession; it is the constitution of the Homeric Achaians on earth and of the Homeric gods on Olympus." Perhaps, and indeed probably, this constitution may be that of the primitive tribe which Romans left to go one way, and Greeks to go another, and Teutons to go a third. The tribe took it with them, as the English take the common law with them, because it was the one kind of polity which they could conceive and act upon; or it may be that the emigrants from the primitive Aryan stock only took with them a good aptitude—an excellent political nature, which similar circumstances in distant countries were afterwards to develop into like forms. But anyhow it is impossible not to trace the supremacy of Teutons, Greeks, and Romans in part to their common form of government. The contests of the assembly cherished the principle of change; the influence of the elders insured sedateness and preserved the mould of thought; and, in the best cases, military discipline was not impaired by freedom, though military intelligence was enhanced with the general intelligence. A Roman army was a free body, at its own choice governed by a peremptory despotism.

The mixture of races was often an advantage, too. Much as the old world believed in pure blood, it had very little of it. Most historic nations conquered pre-historic nations, and though they massacred many, they did not massacre all. They enslaved the subject men, and they married the subject women. No doubt the whole bond of early society was the bond of descent; no doubt it was essential to the notions of a new nation that it should have had common ancestors; the modern idea that vicinity of habitation is the natural cement of civil union would have been repelled as an impiety if it could have been conceived as an idea. But by one of those legal fictions which Sir Henry Maine describes so well, primitive nations contrived to do what they found convenient, as well as to adhere to what they fancied to be right. When they did not beget they adopted; they solemnly made believe that new persons were descended from the old stock, though everybody knew that in flesh and blood they were not. They made an artificial unity in default of a real unity; and, what it is not easy to understand now, the sacred sentiment requiring unity of race was somehow satisfied: what was made did as well as what was born. Nations with these sort of max-

ims are not likely to have unity of race in the modern sense, and as a physiologist understands it. What sorts of unions improve the breed, and which are worse than both the father-race and the mother, it is not very easy to say. The subject was reviewed by M. Quatrefages in an elaborate report upon the occasion of the French Exhibition, of all things in the world. M. Quatrefages quotes from another writer the phrase that South America is a great laboratory of experiments in the mixture of races, and reviews the different results which different cases have shown. In South Carolina the mulatto race is not very prolific, whereas in Louisiana and Florida it decidedly is so. In Jamaica and in Java the mulatto cannot reproduce itself after the third generation; but on the continent of America, as everybody knows, the mixed race is now must numerous, and spreads generation after generation without impediment. Equally various likewise in various cases has been the fate of the mixed race between the white man and the native American; sometimes it prospers, sometimes it fails. And M. Quatrefages concludes his description thus: "*En acceptant comme vraies toutes les observations qui tendent à faire admettre qu'il en sera autrement dans les localités dont j'ai parlé plus haut, quelle est la conclusion à tirer de faits aussi peu semblables? Evidemment, on est obligé de reconnaître que le développement de la race mulâtre est favorisé, retardé, ou empêché par des circonstances locales; en d'autres termes, qu'il dépend des influences exercées par l'ensemble des conditions d'existence, par le milieu.*" By which I understand him to mean that the mixture of race sometimes brings out a form of character better suited than either parent form to the place and time; that in such cases, by a kind of natural selection, it dominates over both parents, and perhaps supplants both, whereas in other cases the mixed race is not as good then and there as other parent forms, and then it passes away soon and of itself.

Early in history the continual mixtures by conquest were just so many experiments in mixing races as are going on in South America now. New races wandered into new districts, and half killed, half mixed with the old races. And the result was doubtless as various and as difficult to account for then as now; sometimes the crossing answered, sometimes it failed. But when the mixture was at its best it must have excelled both parents in

that of which so much has been said; that is, variability, and consequently progressiveness. There is more life in mixed nations. France, for instance, is justly said to be the mean term between the Latin and the German races. A Norman, as you may see by looking at him, is of the north; a Provençal is of the south, of all that there is most southern. You have in France Latin, Celtic, German, compounded in an infinite number of proportions: one as she is in feeling, she is various not only in the past history of her various provinces, but in their present temperaments. Like the Irish element and the Scotch element in the English House of Commons, the variety of French races contributes to the play of the polity; it gives a chance for fitting new things which otherwise there would not be. And early races must have wanted mixing more than modern races. It is said, in answer to the Jewish boast that "their race still prospers, though it is scattered and breeds in-and-in," "You prosper because you are so scattered; by acclimatization in various regions your nation has acquired singular elements of variety; it contains within itself the principle of variability which other nations must seek by intermarriage." In the beginning of things there was certainly no cosmopolitan race like the Jews; each race was a sort of "parish race," narrow in thought and bounded in range, and it wanted mixing accordingly.

But the mixture of races has a singular danger as well as a singular advantage in the early world. We know now the Anglo-Indian suspicion or contempt for "half-castes." The union of the Englishman and the Hindoo produces something not only between races, but between moralities. They have no inherited creed or plain place in the world; they have none of the fixed traditional sentiments which are the stays of human nature. In the early world many mixtures must have wrought many ruins; they must have destroyed what they could not replace—an inbred principle of discipline and of order. But if these unions of races did not work thus; if, for example, the two races were so near akin that their morals united as well as their breeds, if one race by its great numbers and prepotent organization so presided over the other as to take it up and assimilate it, and leave no separate remains of it, then the admixture was invaluable. It added to the probability of variability, and therefore of improvement; and if that improvement even in part took the military

line, it might give the mixed and ameliorated state a study advantage in the battle of nations, and a greater chance of lasting in the world.

Another mode in which one state acquires a superiority over competing states is by provisional institutions, if I may so call them. The most important of these—slavery—arises out of the same early conquest as the mixture of races. A slave is an unassimilated, an undigested atom; something which is in the body politic, but yet is hardly part of it. Slavery, too, has a bad name in the later world, and very justly. We connect it with gangs in chains, with laws which keep men ignorant, with laws that hinder families. But the evils which we have endured from slavery in recent ages must not blind us to, or make us forget, the great services that slavery rendered in early ages. There is a wonderful presumption in its favor; it is one of the institutions which, at a certain stage of growth, all nations in all countries choose and cleave to. "Slavery," says Aristotle, "exists by the law of nature," meaning that it was everywhere to be found—was a rudimentary universal point of polity. "There are very many English colonies," said Edward Gibbon Wakefield, as late as 1848, "who would keep slaves at once if we would let them," and he was speaking not only of old colonies trained in slavery, and raised upon the products of it, but likewise of new colonies started by freemen, and which ought, one would think, to wish to contain freemen only. But Wakefield knew what he was saying; he was a careful observer of rough societies, and he had watched the minds of men in them. He had seen that leisure is the great need of early societies, and slaves only can give men leisure. All freemen in new countries must be pretty equal; everyone has labor, and everyone has land; capital, at least in agricultural countries (for pastoral countries are very different), is of little use; it cannot hire labor; the laborers go and work for themselves. There is a story often told of a great English capitalist who went out to Australia with a shipload of laborers and a carriage; his plan was that the laborers should build a house for him, and that he would keep his carriage, just as in England. But (so the story goes) he had to try to live in his carriage, for his laborers left him, and went away to work for themselves.

In such countries there can be few gentlemen and no ladies.

Refinement is only possible when leisure is possible; and slavery first makes it possible. It creates a set of persons born to work that others may not work, and not to think in order that others may think. The sort of originality which slavery gives is of the first practical advantage in early communities; and the repose it gives is a great artistic advantage when they come to be described in history. The patriarchs Abraham, Isaac, and Jacob could not have had the steady calm which marks them if they had themselves been teased and hurried about their flocks and herds. Refinement of feeling and repose of appearance have indeed no market value in the early bidding of nations; they do not tend to secure themselves a long future or any future. But originality in war does, and slave-owning nations, having time to think, are likely to be more shrewd in policy, and more crafty in strategy.

No doubt this momentary gain is bought at a ruinous after-cost. When other sources of leisure become possible, the one use of slavery is past. But all its evils remain, and even grow worse. " Retail " slavery—the slavery in which a master owns a few slaves, whom he well knows and daily sees—is not at all an intolerable state; the slaves of Abraham had no doubt a fair life, as things went in that day. But wholesale slavery, where men are but one of the investments of large capital, and where a great owner, so far from knowing each slave, can hardly tell how many gangs of them he works, is an abominable state. This is the slavery which has made the name revolting to the best minds, and has nearly rooted the thing out of the best of the world. There is no out-of-the-way marvel in this. The whole history of civilization is strewn with creeds and institutions which were invaluable at first, and deadly afterwards. Progress would not have been the rarity it is if the early food had not been the late poison. A full examination of these provisional institutions would need half a volume, and would be out of place and useless here. Venerable oligarchy, august monarchy, are two that would alone need large chapters. But the sole point here necessary is to say that such preliminary forms and feelings at first often bring many graces and many refinements, and often tend to secure them by the preservative military virtue.

There are cases in which some step in intellectual progress gives an early society some gain in war; more obvious cases are

when some kind of moral quality gives some such gain. War both needs and generates certain virtues; not the highest, but what may be called the preliminary virtues, as valor, veracity, the spirit of obedience, the habit of discipline. Any of these, and of others like them, when possessed by a nation, and no matter how generated, will give them a military advantage, and make them more likely to stay in the race of nations. The Romans probably had as much of these efficacious virtues as any race of the ancient world,—perhaps as much as any race in the modern world too. And the success of the nations which possess these martial virtues has been the great means by which their continuance has been secured in the world, and the destruction of the opposite vices insured also. Conquest is the missionary of valor, and the hard impact of military virtues beats meanness out of the world.

In the last century it would have sounded strange to speak, as I am going to speak, of the military advantage of religion. Such an idea would have been opposed to ruling prejudices, and would hardly have escaped philosophical ridicule. But the notion is but a commonplace in our day, for a man of genius has made it his own. Mr. Carlyle's books are deformed by phrases like "infinities" and "verities," and altogether are full of faults, which attract the very young, and deter all that are older. In spite of his great genius, after a long life of writing, it is a question still whether even a single work of his can take a lasting place in high literature. There is a want of sanity in their manner which throws a suspicion on their substance (though it is often profound); and he brandishes one or two fallacies, of which he has himself a high notion, but which plain people will always detect and deride. But whatever may be the fate of his fame, Mr. Carlyle has taught the present generation many lessons, and one of these is that "God-fearing" armies are the best armies. Before this time people laughed at Cromwell's saying, "Trust in God, and keep your powder dry." But we now know that the trust was of as much use as the powder, if not of more. That high concentration of steady feeling makes men dare everything and do anything.

This subject would run to an infinite extent if anyone were competent to handle it. Those kinds of morals and that kind of religion which tend to make the firmest and most effectual

character are sure to prevail, all else being the same; and creeds or systems that conduce to a soft, limp mind tend to perish, except some hard extrinsic force keep them alive. Thus Epicureanism never prospered at Rome, but Stoicism did; the stiff, serious character of the great prevailing nation was attracted by what seemed a confirming creed, and deterred by what looked like a relaxing creed. The inspiriting doctrines fell upon the ardent character, and so confirmed its energy. Strong beliefs win strong men, and then make them stronger. Such is no doubt one cause why monotheism tends to prevail over polytheism; it produces a higher, steadier character, calmed and concentrated by a great single object; it is not confused by competing rites, or distracted by miscellaneous deities. Polytheism is religion in commission, and it is weak accordingly. But it will be said the Jews, who were monotheist, were conquered by the Romans, who were polytheist. Yes, it must be answered, because the Romans had other gifts; they had a capacity for politics, a habit of discipline, and of these the Jews had not the least. The religious advantage was an advantage, but it was counter-weighed.

No one should be surprised at the prominence given to war. We are dealing with early ages; nation-making is the occupation of man in these ages, and it is war that makes nations. Nation-changing comes afterwards, and is mostly effected by peaceful revolution, though even then war, too, plays its part. The idea of an indestructible nation is a modern idea; in early ages all nations were destructible, and the further we go back the more incessant was the work of destruction. The internal decoration of nations is a sort of secondary process, which succeeds when the main forces that create nations have principally done their work. We have here been concerned with the political scaffolding; it will be the task of other papers to trace the process of political finishing and building. The nicer play of finer forces may then require more pleasing thoughts than the fierce fights of early ages can ever suggest. It belongs to the idea of progress that beginnings can never seem attractive to those who live far on; the price of improvement is that the unimproved will always look degraded.

But how far are the strongest nations really the best nations? how far is excellence in war a criterion of other excellence? I cannot answer this now fully, but three or four considerations are

very plain. War, as I have said, nourishes the "preliminary" virtues, and this is almost as much as to say that there are virtues which it does not nourish. All which may be called "grace" as well as virtue it does not nourish; humanity, charity, a nice sense of the rights of others, it certainly does not foster. The insensibility to human suffering, which is so striking a fact in the world as it stood when history first reveals it, is doubtless due to the warlike origin of the old civilization. Bred in war, and nursed in war, it could not revolt from the things of war, and one of the principal of these is human pain. Since war has ceased to be the moving force in the world, men have become more tender one to another, and shrink from what they used to inflict without caring; and this not so much because men are improved (which may or may not be in various cases), but because they have no longer the daily habit of war—have no longer formed their notions upon war, and therefore are guided by thoughts and feelings which soldiers as such—soldiers educated simply by their trade—are too hard to understand.

Very like this is the contempt for physical weakness and for women which marks early society too. The non-combatant population is sure to fare ill during the ages of combat. But these defects, too, are cured or lessened; women have now marvellous means of winning their way in the world; and mind without muscle has far greater force than muscle without mind. These are some of the after-changes in the interior of nations, of which the causes must be scrutinized, and I now mention them only to bring out how many softer growths have now half-hidden the old and harsh civilization which war made.

But it is very dubious whether the spirit of war does not still color our morality far too much. Metaphors from law and metaphors from war make most of our current moral phrases, and a nice examination would easily explain that both rather vitiate what both often illustrate. The military habit makes man think far too much of definite action, and far too little of brooding meditation. Life is not a set campaign, but an irregular work, and the main forces in it are not overt resolutions, but latent and half-involuntary promptings. The mistake of military ethics is to exaggerate the conception of discipline, and so to present the moral force of the will in a barer form than it ever ought to take.

Military morals can direct the axe to cut down the tree, but it knows nothing of the quiet force by which the forest grows.

What has been said is enough, I hope, to bring out that there are many qualities and many institutions of the most various sort which give nations an advantage in military competition; that most of these and most warlike qualities tend principally to good; that the constant winning of these favored competitors is the particular mode by which the best qualities wanted in elementary civilization are propagated and preserved.

CHOICE EXAMPLES OF EARLY PRINTING AND ENGRAVING.

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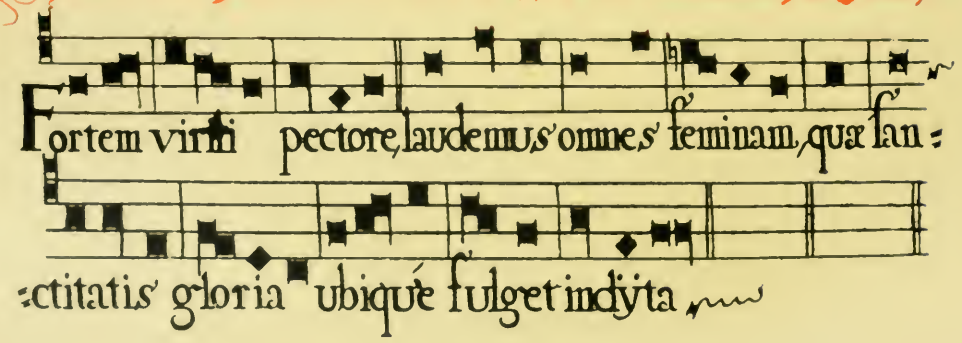
PART OF A PAGE SELECTED FROM FUST AND SCHOEFFER'S SECOND PSALTER.

The decisive success and rapid sale of the first printed Psalter, issued in 1457, induced Schoeffer to start work upon a larger-sized edition of the Psalter which was completed in October, 1459, and in which the colored initials again appear as in the first edition.

Presens psalmorꝫ codex: venustate capitalium decoratus · rubricationibusqꝫ sufficienter distinctus · adinuencōne artificiosa imprimendi ac caracterizandi: absqꝫ vlla calami exaracōne sic effigiatus · et ad laudem dei ac honorē sancti Jacobi est ꝯsūmatꝰ, Per Johem fust ciuē magūtinū · et Petrū Schoifher de gernsheym clericū · Anno dñi Millesimo cccc · lix · xxix · die · mensis Augusti,


Fortem virili pectore, laudemus omnes feminam, quæ san-
-ctitatis gloria ubique fulget indyta

CHAPTER III

NATION-MAKING

IN the last essay I endeavored to show that in the early age of man—the "fighting age" I called it—there was a considerable, though not certain, tendency towards progress. The best nations conquered the worst; by the possession of one advantage or another the best competitor overcame the inferior competitor. So long as there was continual fighting there was a likelihood of improvement in martial virtues, and in early times many virtues are really "martial"—that is, tend to success in war—which in later times we do not think of so calling, because the original usefulness is hid by their later usefulness. We judge of them by the present effects, not by their first. The love of law, for example, is a virtue which no one now would call martial, yet in early times it disciplined nations, and the disciplined nations won. The gift of "conservative innovation"—the gift of matching new institutions to old—is not now-a-days a warlike virtue, yet the Romans owed much of their success to it. Alone among ancient nations they had the deference to usage which combines nations, and the partial permission of selected change which improves nations; and therefore they succeeded. Just so in most cases, all through the earliest times, martial merit is a token of real merit: the nation that wins is the nation that ought to win. The simple virtues of such ages mostly make a man a soldier if they make him anything. No doubt the brute force of number may be too potent even then (as so often it is afterwards): civilization may be thrown back by the conquest of many very rude men over a few less rude men. But the first elements of civilization are great military advantages, and, roughly, it is a rule of the first times that you can infer merit from conquest, and that progress is promoted by the competitive examination of constant war.

This principle explains at once why the " protected " regions of the world—the interior of continents like Africa, outlying islands like Australia or New Zealand—are of necessity backward. They are still in the preparatory school; they have not been taken on class by class, as No. II, being a little better, routed and effaced No. I; and as No. III, being a little better still, routed and effaced No. II. And it explains why Western Europe was early in advance of other countries, because there the contest of races was exceedingly severe. Unlike most regions, it was a tempting part of the world, and yet not a corrupting part; those who did not possess it wanted it, and those who had it, not being enervated, could struggle hard to keep it. The conflict of nations is at first a main force in the improvement of nations.

But what are nations? What are these groups which are so familiar to us, and yet, if we stop to think, so strange; which are as old as history; which Herodotus found in almost as great numbers and with quite as marked distinctions as we see them now? What breaks the human race up into fragments so unlike one another, and yet each in its interior so monotonous? The question is most puzzling, though the fact is so familiar, and I would not venture to say that I can answer it completely, though I can advance some considerations which, as it seems to me, go a certain way towards answering it. Perhaps these same considerations throw some light, too, on the further and still more interesting question why some few nations progress, and why the greater part do not.

Of course at first all such distinctions of nation and nation were explained by original diversity of race. They are dissimilar, it was said, because they were created dissimilar. But in most cases this easy supposition will not do its work. You cannot (consistently with plain facts) imagine enough original races to make it tenable. Some half-dozen or more great families of men may or may not have been descended from separate first stocks, but sub-varieties have certainly not so descended. You may argue, rightly or wrongly, that all Aryan nations are of a single or peculiar origin, just as it was long believed that all Greek-speaking nations were of one such stock. But you will not be listened to if you say that there were one Adam and Eve for Sparta, and another Adam and Eve for Athens.

All Greeks are evidently of one origin, but within the limits of the Greek family, as of all other families, there is some contrast-making force which causes city to be unlike city, and tribe unlike tribe.

Certainly, too, nations did not originate by simple natural selection, as wild varieties of animals (I do not speak now of species) no doubt arise in nature. Natural selection means the preservation of those individuals which struggle best with the forces that oppose their race. But you could not show that the natural obstacles opposing human life much differed between Sparta and Athens, or indeed between Rome and Athens; and yet Spartans, Athenians, and Romans differ essentially. Old writers fancied (and it was a very natural idea) that the direct effect of climate, or rather of land, sea, and air, and the sum total of physical conditions varied man from man, and changed race to race. But experience refutes this. The English immigrant lives in the same climate as the Australian or Tasmanian, but he has not become like those races; nor will a thousand years, in most respects, make him like them. The Papuan and the Malay, as Mr. Wallace finds, live now, and have lived for ages, side by side in the same tropical regions, with every sort of diversity. Even in animals his researches show, as by an object-lesson, that the direct efficacy of physical conditions is overrated. "Borneo," he says, "closely resembles New Guinea, not only in its vast size and freedom from volcanoes, but in its variety of geological structure, its uniformity of climate, and the general aspect of the forest vegetation that clothes its surface. The Moluccas are the counterpart of the Philippines in their volcanic structure, their extreme fertility, their luxuriant forests, and their frequent earthquakes; and Bali, with the east end of Java, has a climate almost as arid as that of Timor. Yet between these corresponding groups of islands, constructed, as it were, after the same pattern, subjected to the same climate, and bathed by the same oceans, there exists the greatest possible contrast, when we compare their animal productions. Nowhere does the ancient doctrine—that differences or similarities in the various forms of life that inhabit different countries are due to corresponding physical differences or similarities in the countries themselves—meet with so direct and palpable a contradiction. Borneo

and New Guinea, as alike physically as two distinct countries can be, are zoologically as wide as the poles asunder; while Australia, with its dry winds, its open plains, its stony deserts, and its temperate climate, yet produces birds and quadrupeds which are closely related to those inhabiting the hot, damp, luxuriant forests which everywhere clothe the plains and mountains of New Guinea." That is, we have like living things in the most dissimilar situations, and unlike living things in the most similar ones. And though some of Mr. Wallace's speculations on ethnology may be doubtful, no one doubts that in the archipelago he has studied so well, as often elsewhere in the world, though rarely with such marked emphasis, we find like men in contrasted places, and unlike men in resembling places. Climate is clearly not the force which makes nations, for it does not always make them, and they are often made without it.

The problem of "nation-making"—that is, the explanation of the origin of nations such as we now see them, and such as in historical times they have always been—cannot, as it seems to me, be solved without separating it into two: one, the making of broadly marked races, such as the negro or the red man or the European; and the second, that of making the minor distinctions, such as the distinction between Spartan and Athenian, or between Scotchman and Englishman. Nations, as we see them, are (if my arguments prove true) the produce of two great forces: one the race-making force which, whatever it was, acted in antiquity, and has now wholly, or almost, given over acting; and the other the nation-making force, properly so called, which is acting now as much as it ever acted, and creating as much as it ever created.

The strongest light on the great causes which have formed and are forming nations is thrown by the smaller causes which are altering nations. The way in which nations change, generation after generation, is exceedingly curious, and the change occasionally happens when it is very hard to account for. Something seems to steal over society, say of the Regency time as compared with that of the present Queen. If we read of life at Windsor (at the cottage now pulled down), or of Bond Street as it was in the days of the Loungers (an extinct race), or of St. James's Street as it was when Mr. Fox and his party

tried to make "political capital" out of the dissipation of an heir apparent, we seem to be reading not of the places we know so well, but of very distant and unlike localities. Or let anyone think how little is the external change in England between the age of Elizabeth and the age of Anne compared with the national change. How few were the alterations in physical condition, how few (if any) the scientific inventions affecting human life which the later period possessed, but the earlier did not! How hard it is to say what has caused the change in the people! And yet how total is the contrast, at least at first sight! In passing from Bacon to Addison, from Shakespeare to Pope, we seem to pass into a new world.

In the first of these essays I spoke of the mode in which the literary change happens, and I recur to it because, literature being narrower and more definite than life, a change in the less serves as a model and illustration of the change in the greater. Some writer, as was explained, not necessarily a very excellent writer or a remembered one, hit on something which suited the public taste: he went on writing, and others imitated him, and they so accustomed their readers to that style that they would bear nothing else. Those readers who did not like it were driven to the works of other ages and other countries—had to despise the "trash of the day," as they would call it. The age of Anne patronized Steele, the beginner of the essay, and Addison its perfecter, and it neglected writings in a wholly discordant key. I have heard that the founder of the "Times" was asked how all the articles in the "Times" came to seem to be written by one man, and that he replied, "Oh, there is always some one best contributor, and all the rest copy." And this is doubtless the true account of the manner in which a certain trade-mark, a curious and indefinable unity, settles on every newspaper. Perhaps it would be possible to name the men who a few years since created the "Saturday Review" style, now imitated by another and a younger race. But when the style of a periodical is once formed, the continuance of it is preserved by a much more despotic impulse than the tendency to imitation,—by the self-interest of the editor, who acts as trustee, if I may say so, for the subscribers. The regular buyers of a periodical want to read what they have been used to read—the same sort of thought,

the same sort of words. The editor sees that they get that sort. He selects the suitable, the conforming articles, and he rejects the non-conforming. What the editor does in the case of a periodical, the readers do in the case of literature in general. They patronize one thing and reject the rest.

Of course there was always some reason (if we only could find it) which gave the prominence in each age to some particular winning literature. There always is some reason why the fashion of female dress is what it is. But just as in the case of dress we know that now-a-days the determining cause is very much of an accident, so in the case of literary fashion, the origin is a good deal of an accident. What the milliners of Paris, or the *demi-monde* of Paris, enjoin our English ladies, is (I suppose) a good deal chance; but as soon as it is decreed, those whom it suits and those whom it does not all wear it. The imitative propensity at once insures uniformity; and "that horrid thing we wore last year" (as the phrase may go) is soon nowhere to be seen. Just so a literary fashion spreads, though I am far from saying with equal primitive unreasonableness—a literary taste always begins on some decent reason, but once started, it is propagated as a fashion in dress is propagated; even those who do not like it read it because it is there, and because nothing else is easily to be found.

The same patronage of favored forms, and persecution of disliked forms, are the main causes, too, I believe, which change national character. Some one attractive type catches the eye, so to speak, of the nation, or a part of the nation, as servants catch the gait of their masters, or as mobile girls come home speaking the special words and acting the little gestures of each family whom they may have been visiting. I do not know if many of my readers happen to have read Father Newman's celebrated sermon, "Personal Influence the Means of Propagating the Truth;" if not, I strongly recommend them to do so. They will there see the opinion of a great practical leader of men, of one who has led very many where they little thought of going, as to the mode in which they are to be led; and what he says, put shortly and simply, and taken out of his delicate language, is but this—that men are guided by type, not by argument; that some winning instance must be set up before them, or the sermon will be vain, and the doctrine will

not spread. I do not want to illustrate this matter from religious history, for I should be led far from my purpose, and after all I can but teach the commonplace that it is the life of teachers which is catching, not their tenets. And again, in political matters, how quickly a leading statesman can change the tone of the community! We are most of us earnest with Mr. Gladstone; we were most of us not so earnest in the time of Lord Palmerston. The change is what every one feels, though no one can define it. Each predominant mind calls out a corresponding sentiment in the country: most feel it a little. Those who feel it much express it much; those who feel it excessively express it excessively; those who dissent are silent, or unheard.

After such great matters as religion and politics, it may seem trifling to illustrate the subject from little boys. But it is not trifling. The bane of philosophy is pomposity; people will not see that small things are the miniatures of greater, and it seems a loss of abstract dignity to freshen their minds by object lessons from what they know. But every boarding-school changes as a nation changes. Most of us may remember thinking, "How odd it is that this 'half' should be so unlike last 'half:' now we never go out of bounds, last half we were always going: now we play rounders, then we played prisoner's base;" and so through all the easy life of that time. In fact, some ruling spirits, some one or two ascendant boys, had left, one or two others had come; and so all was changed. The models were changed, and the copies changed; a different thing was praised, and a different thing bullied. A curious case of the same tendency was noticed to me only lately. A friend of mine—a Liberal Conservative—addressed a meeting of workingmen at Leeds, and was much pleased at finding his characteristic, and perhaps refined points, both apprehended and applauded. "But then," as he narrated, "up rose a blatant Radical who said the very opposite things, and the workingmen cheered him, too, and quite equally." He was puzzled to account for so rapid a change. But the mass of the meeting was no doubt nearly neutral, and, if set going, quite ready to applaud any good words without much thinking. The ringleaders changed. The radical tailor started the radical cheer; the more moderate shoemaker started the moderate

cheer; and the great bulk followed suit. Only a few in each case were silent, and an absolute contrast was in ten minutes presented by the same elements.

The truth is that the propensity of man to imitate what is before him is one of the strongest parts of his nature. And one sign of it is the great pain which we feel when our imitation has been unsuccessful. There is a cynical doctrine that most men would rather be accused of wickedness than of *gaucherie*. And this is but another way of saying that the bad copying of predominant manners is felt to be more of a disgrace than common consideration would account for its being, since *gaucherie* in all but extravagant cases is not an offence against religion or morals, but is simply bad imitation.

We must not think that this imitation is voluntary, or even conscious. On the contrary, it has its seat mainly in very obscure parts of the mind, whose notions, so far from having been consciously produced, are hardly felt to exist; so far from being conceived beforehand, are not even felt at the time. The main seat of the imitative part of our nature is our belief, and the causes predisposing us to believe this, or disinclining us to believe that, are among the obscurest parts of our nature. But as to the imitative nature of credulity there can be no doubt. In "Eothen" there is a capital description of how every sort of European resident in the East, even the shrewd merchant and "the post-captain," with his bright, wakeful eyes of commerce, comes soon to believe in witchcraft, and to assure you, in confidence, that there "really is something in it." He has never seen anything convincing himself, but he has seen those who have seen those who have seen those who have seen. In fact, he has lived in an atmosphere of infectious belief, and he has inhaled it. Scarcely any one can help yielding to the current infatuations of his sect or party. For a short time—say some fortnight—he is resolute; he argues and objects; but, day by day, the poison thrives, and reason wanes. What he hears from his friends, what he reads in the party organ, produces its effect. The plain, palpable conclusion which every one around him believes has an influence yet greater and more subtle; that conclusion seems so solid and unmistakable; his own good arguments get daily more and more like a dream.

Soon the gravest sage shares the folly of the party with which he acts, and the sect with which he worships.

In true metaphysics I believe that, contrary to common opinion, unbelief far oftener needs a reason and requires an effort than belief. Naturally, and if man were made according to the pattern of the logicians, he would say, "When I see a valid argument I will believe, and till I see such argument I will not believe." But, in fact, every idea vividly before us soon appears to us to be true, unless we keep up our perceptions of the arguments which prove it untrue, and voluntarily coerce our minds to remember its falsehood. "All clear ideas are true," was for ages a philosophical maxim, and though no maxim can be more unsound, none can be more exactly conformable to ordinary human nature. The child resolutely accepts every idea which passes through its brain as true; it has no distinct conception of an idea which is strong, bright, and permanent, but which is false, too. The mere presentation of an idea, unless we are careful about it, or unless there is within some unusual resistance, makes us believe it; and this is why the belief of others adds to our belief so quickly, for no ideas seem so very clear as those inculcated on us from every side.

The grave part of mankind are quite as liable to these imitated beliefs as the frivolous part. The belief of the money-market, which is mainly composed of grave people, is as imitative as any belief. You will find one day everyone enterprising, enthusiastic, vigorous, eager to buy, and eager to order: in a week or so you will find almost the whole society depressed, anxious, and wanting to sell. If you examine the reasons for the activity, or for the inactivity, or for the change, you will hardly be able to trace them at all, and as far as you can trace them, they are of little force. In fact, these opinions were not formed by reason, but by mimicry. Something happened that looked a little good, on which eager, sanguine men talked loudly, and common people caught their tone. A little while afterwards, and when people were tired of talking this, something also happened looking a little bad, on which the dismal, anxious people began, and all the rest followed their words. And in both cases an avowed dissentient is set down as "crotchety." "If you want," said Swift, "to gain the reputation of a sensible man, you should be of the opinion of the

person with whom for the time being you are conversing." There is much quiet intellectual persecution among "reasonable" men; a cautious person hesitates before he tells them anything new, for if he gets a name for such things he will be called "flighty," and in times of decision he will not be attended to.

In this way the infection of imitation catches men in their most inward and intellectual part—their creed. But it also invades men—by the most bodily part of the mind—so to speak—the link between soul and body—the manner. No one needs to have this explained; we all know how a kind of subtle influence makes us imitate or try to imitate the manner of those around us. To conform to the fashion of Rome—whatever the fashion may be, and whatever Rome we may for the time be at—is among the most obvious needs of human nature. But what is not so obvious, though as certain, is that the influence of the imitation goes deep as well as extends wide. "The matter," as Wordsworth says, "of style very much comes out of the manner." If you will endeavor to write an imitation of the thoughts of Swift in a copy of the style of Addison, you will find that not only is it hard to write Addison's style, from its intrinsic excellence, but also that the more you approach to it the more you lose the thought of Swift. The eager passion of the meaning beats upon the mild drapery of the words. So you could not express the plain thoughts of an Englishman in the grand manner of a Spaniard. Insensibly, and as by a sort of magic, the kind of manner which a man catches eats into him, and makes him in the end what at first he only seems.

This is the principal mode in which the greatest minds of an age produce their effect. They set the tone which others take, and the fashion which others use. There is an odd idea that those who take what is called a "scientific view" of history need rate lightly the influence of individual character. It would be as reasonable to say that those who take a scientific view of nature need think little of the influence of the sun. On the scientific view a great man is a great new cause (compounded or not out of other causes, for I do not here, or elsewhere in these papers, raise the question of free-will), but, anyhow, new in all its effects, and all its results. Great models

for good and evil sometimes appear among men, who follow them either to improvement or degradation.

I am, I know, very long and tedious in setting out this; but I want to bring home to others what every new observation of society brings more and more freshly to myself—that this unconscious imitation and encouragement of appreciated character, and this equally unconscious shrinking from and persecution of disliked character, is the main force which moulds and fashions men in society as we now see it. Soon I shall try to show that the more acknowledged causes, such as change of climate, alteration of political institutions, progress of science, act principally through this cause; that they change the object of imitation and the object of avoidance, and so work their effect. But first I must speak of the origin of nations—of nation-making as one may call it—the proper subject of this paper.

The process of nation-making is one of which we have obvious examples in the most recent times, and which is going on now. The most simple example is the foundation of the first State of America, say New England, which has such a marked and such a deep national character. A great number of persons agreeing in fundamental disposition, agreeing in religion, agreeing in politics, form a separate settlement; they exaggerate their own disposition, teach their own creed, set up their favorite government; they discourage all other dispositions, persecute other beliefs, forbid other forms or habits of government. Of course a nation so made will have a separate stamp and mark. The original settlers began of one type; they sedulously imitated it; and (though other causes have intervened and disturbed it) the necessary operation of the principles of inheritance has transmitted many original traits still unaltered, and has left an entire New England character—in no respect unaffected by its first character.

This case is well known, but it is not so that the same process, in a weaker shape, is going on in America now. Congeniality of sentiment is a reason of selection and a bond of cohesion in the "West" at present. Competent observers say that townships grow up there by each place taking its own religion, its own manners, and its own ways. Those who have these morals and that religion go to that place, and stay there; and

those who have not these morals and that religion either settle elsewhere at first, or soon pass on. The days of colonization by sudden "swarms" of like creed is almost over, but a less visible process of attraction by similar faith over similar is still in vigor, and very likely to continue.

And in cases where this principle does not operate all new settlements, being formed of "emigrants," are sure to be composed of rather restless people, mainly. The stay-at-home people are not to be found there, and these are the quiet, easy people. A new settlement voluntarily formed (for of old times, when people were expelled by terror, I am not speaking) is sure to have in it much more than the ordinary proportion of active men, and much less than the ordinary proportion of inactive; and this accounts for a large part, though not perhaps all, of the difference between the English in England, and the English in Australia.

The causes which formed New England in recent times cannot be conceived as acting much upon mankind in their infancy. Society is not then formed upon a "voluntary system," but upon an involuntary. A man in early ages is born to a certain obedience, and cannot extricate himself from an inherited government. Society then is made up, not of individuals, but of families; creeds then descend by inheritance in those families. Lord Melbourne once incurred the ridicule of philosophers by saying he should adhere to the English Church because it was the religion of his fathers. The philosophers, of course, said that a man's fathers' believing anything was no reason for his believing it unless it was true. But Lord Melbourne was only uttering out of season, and in a modern time, one of the most firm and accepted maxims of old times. A secession on religious grounds of isolated Romans to sail beyond sea would have seemed to the ancient Romans an impossibility. In still ruder ages the religion of savages is a thing too feeble to create a schism or to found a community. We are dealing with people capable of history when we speak of great ideas, not with pre-historic flint-men or the present savages. But though under very different forms, the same essential causes—the imitation of preferred characters and the elimination of detested characters—were at work in the oldest times, and are at work among rude men now. Strong as the

propensity to imitation is among civilized men, we must conceive it as an impulse of which their minds have been partially denuded. Like the far-seeing sight, the infallible hearing, the magical scent of the savage, it is a half-lost power. It was strongest in ancient times, and is strongest in uncivilized regions.

This extreme propensity to imitation is one great reason of the amazing sameness which every observer notices in savage nations. When you have seen one Fuegian, you have seen all Fuegians—one Tasmanian, all Tasmanians. The higher savages, as the New Zealanders, are less uniform; they have more of the varied and compact structure of civilized nations, because in other respects they are more civilized. They have greater mental capacity—larger stores of inward thought. But much of the same monotonous nature clings to them, too. A savage tribe resembles a herd of gregarious beasts; where the leader goes they go, too; they copy blindly his habits, and thus soon become that which he already is. For not only the tendency, but also the power to imitate, is stronger in savages than civilized men. Savages copy quicker, and they copy better. Children, in the same way, are born mimics; they cannot help imitating what comes before them. There is nothing in their minds to resist the propensity to copy. Every educated man has a large inward supply of ideas to which he can retire, and in which he can escape from or alleviate unpleasant outward objects. But a savage or a child has no resource. The external movements before it are its very life; it lives by what it sees and hears. Uneducated people in civilized nations have vestiges of the same condition. If you send a housemaid and a philosopher to a foreign country of which neither knows the language, the chances are that the housemaid will catch it before the philosopher. He has something else to do; he can live in his own thoughts. But unless she can imitate the utterances, she is lost; she has no life till she can join in the chatter of the kitchen. The propensity to mimicry, and the power of mimicry, are mostly strongest in those who have least abstract minds. The most wonderful examples of imitation in the world are perhaps the imitations of civilized men by savages in the use of martial weapons. They learn the knack, as sportsmen call it, with inconceivable rapidity. A North Amer-

ican Indian—an Australian even—can shoot as well as any white man. Here the motive is at its maximum, as well as the innate power. Every savage cares more for the power of killing than for any other power.

The persecuting tendency of all savages, and, indeed, of all ignorant people, is even more striking than their imitative tendency. No barbarian can bear to see one of his nation deviate from the old barbarous customs and usages of their tribe. Very commonly all the tribe would expect a punishment from the gods if any one of them refrained from what was old, or began what was new. In modern times and in cultivated countries we regard each person as responsible only for his own actions, and do not believe, or think of believing, that the misconduct of others can bring guilt on them. Guilt to us is an individual taint consequent on choice and cleaving to the chooser. But in early ages the act of one member of the tribe is conceived to make all the tribe impious, to offend its peculiar god, to expose all the tribe to penalties from heaven. There is no "limited liability" in the political notions of that time. The early tribe or nation is a religious partnership, on which a rash member by a sudden impiety may bring utter ruin. If the state is conceived thus, toleration becomes wicked. A permitted deviation from the transmitted ordinances becomes simply folly. It is a sacrifice of the happiness of the greatest number It is allowing one individual, for a moment's pleasure or a stupid whim, to bring terrible and irretrievable calamity upon all. No one will ever understand even Athenian history who forgets this idea of the old world, though Athens was, in comparison with others, a rational and sceptical place, ready for new views, and free from old prejudices. When the street statues of Hermes were mutilated all the Athenians were frightened and furious; they thought that they should all be ruined because some one had mutilated a god's image, and so offended him. Almost every detail of life in the classical times—the times when real history opens—was invested with a religious sanction; a sacred ritual regulated human action; whether it was called "law" or not, much of it was older than the word "law;" it was part of an ancient usage conceived as emanating from a superhuman authority, and not to be transgressed without risk of punishment by more than mortal power. There

was such a *solidarité* then between citizens that each might be led to persecute the other for fear of harm to himself.

It may be said that these two tendencies of the early world—that to persecution and that to imitation—must conflict; that the imitative impulse would lead men to copy what is new, and that persecution by traditional habit would prevent their copying it. But in practice the two tendencies co-operate. There is a strong tendency to copy the most common thing, and that common thing is the old habit. Daily imitation is far oftenest a conservative force, for the most frequent models are ancient. Of course, however, something new is necessary for every man and for every nation. We may wish, if we please, that to-morrow shall be like to-day, but it will not be like it. New forces will impinge upon us; new wind, new rain, and the light of another sun; and we must alter to meet them. But the persecuting habit and the imitative combine to insure that the new thing shall be in the old fashion; it must be an alteration, but it shall contain as little of variety as possible. The imitative impulse tends to this, because men most easily imitate what their minds are best prepared for,—what is like the old, yet with the inevitable minimum of alteration; what throws them least out of the old path, and puzzles least their minds. The doctrine of development means this,—that in unavoidable changes men like the new doctrine which is most of a "preservative addition" to their old doctrines. The imitative and the persecuting tendencies make all change in early nations a kind of selective conservatism, for the most part keeping what is old, but annexing some new but like practice —an additional turret in the old style.

It is this process of adding suitable things and rejecting discordant things which has raised those scenes of strange manners which in every part of the world puzzle the civilized men who come upon them first. Like the old head-dress of mountain villages, they make the traveller think not so much whether they are good or whether they are bad, as wonder how anyone could have come to think of them; to regard them as "monstrosities," which only some wild abnormal intellect could have hit upon. And wild and abnormal indeed would be that intellect if it were a single one at all. But in fact such manners are the growth of ages, like Roman law or

the British constitution. No one man—no one generation—could have thought of them,—only a series of generations trained in the habits of the last and wanting something akin to such habits, could have devised them. Savages pet their favorite habits, so to say, and preserve them as they do their favorite animals; ages are required, but at last a national character is formed by the confluence of congenial attractions and accordant detestations.

Another cause helps. In early states of civilization there is a great mortality of infant life, and this is a kind of selection in itself—the child most fit to be a good Spartan is most likely to survive a Spartan childhood. The habits of the tribe are enforced on the child; if he is able to catch and copy them he lives; if he cannot he dies. The imitation which assimilates early nations continues through life, but it begins with suitable forms and acts on picked specimens. I suppose, too, that there is a kind of parental selection operating in the same way and probably tending to keep alive the same individuals. Those children which gratified their fathers and mothers most would be most tenderly treated by them, and have the best chance to live, and as a rough rule their favorites would be the children of most "promise," that is to say, those who seemed most likely to be a credit to the tribe according to the leading tribal manners and the existing tribal tastes. The most gratifying child would be the best looked after, and the most gratifying would be the best specimen of the standard then and there raised up.

Even so, I think there will be a disinclination to attribute so marked, fixed, almost physical a thing as national character to causes so evanescent as the imitation of appreciated habit and the persecution of detested habit. But, after all, national character is but a name for a collection of habits more or less universal. And this imitation and this persecution in long generations have vast physical effects. The mind of the parent (as we speak) passes somehow to the body of the child. The transmitted "something" is more affected by habits than it is by anything else. In time an ingrained type is sure to be formed, and sure to be passed on if only the causes I have specified be fully in action and without impediment.

As I have said, I am not explaining the origin of races, but of nations, or, if you like, of tribes. I fully admit that no imi-

tation of predominant manner, or prohibitions of detested manners, will of themselves account for the broadest contrasts of human nature. Such means would no more make a Negro out of a Brahmin, or a Red-man out of an Englishman, than washing would change the spots of a leopard or the color of an Ethiopian. Some more potent causes must co-operate, or we should not have these enormous diversities. The minor causes I deal with made Greek to differ from Greek, but they did not make the Greek race. We cannot precisely mark the limit, but a limit there clearly is.

If we look at the earliest monuments of the human race, we find these race-characters as decided as the race-characters now. The earliest paintings or sculptures we anywhere have give us the present contrasts of dissimilar types as strongly as present observation. Within historical memory no such differences have been created as those between Negro and Greek, between Papuan and Red Indian, between Esquimaux and Goth. We start with cardinal diversities; we trace only minor modifications, and we only see minor modifications. And it is very hard to see how any number of such modifications could change man as he is in one race-type to man as he is in some other. Of this there are but two explanations; one, that these great types were originally separate creations, as they stand—that the Negro was made so, and the Greek made so. But this easy hypothesis of special creation has been tried so often, and has broken down so very often, that in no case, probably, do any great number of careful inquirers very firmly believe it. They may accept it provisionally, as the best hypothesis at present, but they feel about it as they cannot help feeling as to an army which has always been beaten; however strong it seems, they think it will be beaten again. What the other explanation is exactly I cannot pretend to say. Possibly as yet the data for a confident opinion are not before us. But by far the most plausible suggestion is that of Mr. Wallace, that these race-marks are living records of a time when the intellect of man was not as able as it is now to adapt his life and habits to change of region; that consequently early mortality in the first wanderers was beyond conception great; that only those (so to say) haphazard individuals throve who were born with a protected nature—that is, a nature suited to

the climate and the country, fitted to use its advantages, shielded from its natural diseases. According to Mr. Wallace, the Negro is the remnant of the one variety of man who without more adaptiveness than then existed could live in interior Africa. Immigrants died off till they produced him or something like him, and so of the Esquimaux or the American.

Any protective habit also struck out in such a time would have a far greater effect than it could afterwards. A gregarious tribe, whose leader was in some imitable respects adapted to the struggle for life, and which copied its leader, would have an enormous advantage in the struggle for life. It would be sure to win and live, for it would be coherent and adapted, whereas, in comparison, competing tribes would be incoherent and unadapted. And I suppose that in early times, when those bodies did not already contain the records and the traces of endless generations, any new habit would more easily fix its mark on the heritable element, and would be transmitted more easily and more certainly. In such an age, man being softer and more pliable, deeper race-marks would be more easily inscribed and would be more likely to continue legible.

But I have no pretence to speak on such matters; this paper, as I have so often explained, deals with nation-making and not with race-making. I assume a world of marked varieties of man, and only want to show how less marked contrasts would probably and naturally arise in each. Given large homogeneous populations, some Negro, some Mongolian, some Aryan, I have tried to prove how small contrasting groups would certainly spring up within each—some to last and some to perish. These are the eddies in each race-stream which vary its surface, and are sure to last till some new force changes the current. These minor varieties, too, would be infinitely compounded, not only with those of the same race, but with those of others. Since the beginning of man, stream has been a thousand times poured into stream—quick into sluggish, dark into pale—and eddies and waters have taken new shapes and new colors, affected by what went before, but not resembling it. And then on the fresh mass, the old forces of composition and elimination again begin to act, and create over the new surface another world. "Motley was the wear" of the world when Herodotus first looked on it and described

it to us, and thus, as it seems to me, were its varying colors produced

If it be thought that I have made out that these forces of imitation and elimination be the main ones, or even at all powerful ones, in the formation of national character, it will follow that the effect of ordinary agencies upon that character will be more easy to understand than it often seems and is put down in books. We get a notion that a change of government or a change of climate acts equally on the mass of a nation, and so are we puzzled—at least, I have been puzzled—to conceive how it acts. But such changes do not at first act equally on all people in the nation. On many, for a very long time, they do not act at all. But they bring out new qualities, and advertise the effects of new habits. A change of climate, say from a depressing to an invigorating one, so acts. Everybody feels it a little, but the most active feel it exceedingly. They labor and prosper, and their prosperity invites imitation. Just so with the contrary change, from an animating to a relaxing place,—the naturally lazy look so happy as they do nothing, that the naturally active are corrupted. The effect of any considerable change on a nation is thus an intensifying and accumulating effect. With its maximum power it acts on some prepared and congenial individuals; in them it is seen to produce attractive results, and then the habits creating those results are copied far and wide. And, as I believe, it is in this simple but not quite obvious way, that the process of progress and of degradation may generally be seen to run.

CHAPTER IV

NATION-MAKING

ALL theories as to the primitive man must be very uncertain. Granting the doctrine of evolution to be true, man must be held to have a common ancestor with the rest of the Primates. But then we do not know what their common ancestor was like. If ever we are to have a distinct conception of him, it can only be after long years of future researches and the laborious accumulation of materials, scarcely the beginning of which now exists. But science has already done something for us. It cannot yet tell us our first ancestor, but it can tell us much of an ancestor very high up in the line of descent. We cannot get the least idea (even upon the full assumption of the theory of evolution) of the first man; but we can get a very tolerable idea of the Paulo-pre-historic man, if I may so say—of man as he existed some short time (as we now reckon shortness), some ten thousand years, before history began Investigators whose acuteness and diligence can hardly be surpassed—Sir John Lubbock and Mr. Tylor are the chiefs among them—have collected so much and explained so much that they have left a fairly vivid result.

That result is, or seems to me to be, if I may sum it up in my own words, that the modern pre-historic men—those of whom we have collected so many remains, and to whom are due the ancient, strange customs of historical nations (the fossil customs, we might call them, for very often they are stuck by themselves in real civilization, and have no more part in it than the fossils in the surrounding strata)—pre-historic men in this sense were "savages without the fixed habits of savages;" that is, that, like savages, they had strong passions and weak reason; that, like savages, they preferred short spasms of greedy pleasure to mild and equable enjoyment; that, like savages, they could not postpone the present to the future; that, like savages, their ingrained

sense of morality was, to say the best of it, rudimentary and defective. But that, unlike present savages, they had not complex customs and singular customs, odd and seemingly inexplicable rules guiding all human life. And the reasons for these conclusions as to a race too ancient to leave a history, but not too ancient to have left memorials, are briefly these:—First, that we cannot imagine a strong reason without attainments; and, plainly, pre-historic men had not attainments. They would never have lost them if they had. It is utterly incredible that whole races of men in the most distant parts of the world (capable of counting, for they quickly learn to count) should have lost the art of counting, if they had ever possessed it. It is incredible that whole races could lose the elements of common sense, the elementary knowledge as to things material and things mental—the Benjamin Franklin philosophy—if they had ever known it. Without some data the reasoning faculties of man cannot work. As Lord Bacon said, the mind of man must "work upon stuff." And in the absence of the common knowledge which trains us in the elements of reason as far as we are trained, they had no "stuff." Even, therefore, if their passions were not absolutely stronger than ours, relatively they were stronger, for their reason was weaker than our reason. Again, it is certain that races of men capable of postponing the present to the future (even if such races were conceivable without an educated reason) would have had so huge an advantage in the struggles of nations, that no others would have survived them. A single Australian tribe (really capable of such a habit, and really practising it) would have conquered all Australia almost as the English have conquered it. Suppose a race of long-headed Scotchmen, even as ignorant as the Australians, and they would have got from Torres to Bass's Straits, no matter how fierce was the resistance of the other Australians. The whole territory would have been theirs, and theirs only. We cannot imagine innumerable races to have lost, if they had once had it, the most useful of all habits of mind—the habit which would most insure their victory in the incessant contests which, ever since they began, men have carried on with one another and with nature, the habit, which in historical times has above any other received for its possession the victory in those contests. Thirdly, we may be sure that the morality of pre-historic man was as imperfect and as rudimentary

as his reason. The same sort of arguments apply to a self-restraining morality of a high type as apply to a settled postponement of the present to the future upon grounds recommended by argument. Both are so involved in difficult intellectual ideas (and a high morality the most of the two) that it is all but impossible to conceive their existence among people who could not count more than five—who had only the grossest and simplest forms of language—who had no kind of writing or reading—who, as it has been roughly said, had "no pots and no pans"—who could indeed make a fire, but who could hardly do anything else—who could hardly command nature any further. Exactly also like a shrewd far-sightedness, a sound morality on elementary transactions is far too useful a gift to the human race ever to have been thoroughly lost when they had once attained it. But innumerable savages have lost all but completely many of the moral rules most conducive to tribal welfare. There are many savages who can hardly be said to care for human life—who have scarcely the family feelings—who are eager to kill all old people (their own parents included) as soon as they get old and become a burden—who have scarcely the sense of truth—who, probably from a constant tradition of terror, wish to conceal everything, and would (as observers say) "rather lie than not"—whose ideas of marriage are so vague and slight that the idea, "communal marriage" (in which all the women of the tribe are common to all the men, and them only), has been invented to denote it. Now if we consider how cohesive and how fortifying to human societies are the love of truth, and the love of parents, and a stable marriage tie, how sure such feelings would be to make a tribe which possessed them wholly and soon victorious over tribes which were destitute of them, we shall begin to comprehend how unlikely it is that vast masses of tribes throughout the world should have lost all these moral helps to conquest, not to speak of others. If any reasoning is safe as to pre-historic man, the reason which imputes to him a deficient sense of morals is safe, for all the arguments suggested by all our late researches converge upon it, and concur in teaching it.

Nor on this point does the case rest wholly on recent investigations. Many years ago Mr. Jowett said that the classical religions bore relics of the "ages before morality." And this is only one of several cases in which that great thinker has proved

by a chance expression that he had exhausted impending controversies years before they arrived, and had perceived more or less the conclusion at which the disputants would arrive long before the public issue was joined. There is no other explanation of such religions than this. We have but to open Mr. Gladstone's "Homer" in order to see with how intense an antipathy a really moral age would regard the gods and goddesses of Homer; how inconceivable it is that a really moral age should first have invented and then bowed down before them; how plain it is (when once explained) that they are antiquities, like an English court-suit, or a stone-sacrificial knife, for no one would use such things as implements of ceremony, except those who had inherited them from a past age, when there was nothing better.

Nor is there anything inconsistent with our present moral theories of whatever kind in so thinking about our ancestors. The intuitive theory of morality, which would be that naturally most opposed to it, has lately taken a new development. It is not now maintained that all men have the same amount of conscience. Indeed, only a most shallow disputant who did not understand even the plainest facts of human nature could ever have maintained it; if men differ in anything they differ in the fineness and the delicacy of their moral intuitions, however we may suppose those feelings to have been acquired. We need not go as far as savages to learn that lesson; we need only talk to the English poor or to our own servants, and we shall be taught it very completely. The lower classes in civilized countries, like all classes in uncivilized countries, are clearly wanting in the nicer part of those feelings which, taken together, we call the sense of morality. All this an intuitionist who knows his case will now admit, but he will add that, though the amount of the moral sense may and does differ in different persons, yet that as far as it goes it is alike in all. He likens it to the intuition of number, in which some savages are so defective that they cannot really and easily count more than three. Yet as far as three his intuitions are the same as those of civilized people. Unquestionably if there are intuitions at all, the primary truths of number are such. There is a felt necessity in them if in anything, and it would be pedantry to say that any proposition of morals was more certain than that five and five make ten. The

truths of arithmetic, intuitive or not, certainly cannot be acquired independently of experience, nor can those of morals be so either. Unquestionably they were aroused in life and by experience, though after that comes the difficult and ancient controversy whether anything peculiar to them and not to be found in the other facts of life is superadded to them independently of experience out of the vigor of the mind itself. No intuitionist, therefore, fears to speak of the conscience of his pre-historic ancestor as imperfect, rudimentary, or hardly to be discerned, for he has to admit much the same so as to square his theory to plain modern facts, and that theory in the modern form may consistently be held along with them. Of course if an intuitionist can accept this conclusion as to pre-historic men, so assuredly may Mr. Spencer, who traces all morality back to our inherited experience of utility, or Mr. Darwin, who ascribes it to an inherited sympathy, or Mr. Mill, who with characteristic courage undertakes to build up the whole moral nature of man with no help whatever either from ethical intuition or from physiological instinct. Indeed of the everlasting questions, such as the reality of free will, or the nature of conscience, it is, as I have before explained, altogether inconsistent with the design of these papers to speak. They have been discussed ever since the history of discussion begins; human opinion is still divided, and most people still feel many difficulties in every suggested theory, and doubt if they have heard the last word of argument or the whole solution of the problem in any of them. In the interest of sound knowledge it is essential to narrow to the utmost the debatable territory; to see how many ascertained facts there are which are consistent with all theories, how many may, as foreign lawyers would phrase it, be equally held in *condominium* by them.

But though in these great characteristics there is reason to imagine that the pre-historic man—at least the sort of pre-historic man I am treating of, the man some few thousand years before history began, and not at all, at least not necessarily, the primitive man—was identical with a modern savage, in another respect there is equal or greater reason to suppose that he was most unlike a modern savage. A modern savage is anything but the simple being which philosophers of the eighteenth century imagined him to be; on the contrary, his life is twisted into a thousand curious habits; his reason is darkened by a thousand

strange prejudices; his feelings are frightened by a thousand cruel superstitions. The whole mind of a modern savage is, so to say, tattooed over with monstrous images; there is not a smooth place anywhere about it. But there is no reason to suppose the minds of pre-historic men to be so cut and marked; on the contrary, the creation of these habits, these superstitions, these prejudices, must have taken ages. In his nature, it may be said, pre-historic man was the same as a modern savage; it is only in his acquisition that he was different.

It may be objected that if man was developed out of any kind of animal (and this is the doctrine of evolution which, if it be not proved conclusively, has great probability and great scientific analogy in its favor) he would necessarily at first possess animal instincts; that these would only gradually be lost; that in the meantime they would serve as a protection and an aid, and that pre-historic men, therefore, would have important helps and feelings which existing savages have not. And probably of the first men, the first beings worthy to be so called, this was true: they had, or may have had, certain remnants of instincts which aided them in the struggle of existence, and as reason gradually came these instincts may have waned away. Some instincts certainly do wane when the intellect is applied steadily to their subject-matter. The curious "counting boys," the arithmetical prodigies, who can work by a strange innate faculty the most wonderful sums, lose that faculty, always partially, sometimes completely, if they are taught to reckon by rule like the rest of mankind. In like manner I have heard it said that a man could soon reason himself out of the instinct of decency if he would only take pains and work hard enough. And perhaps other primitive instincts may have in like manner passed away. But this does not affect my argument. I am only saying that these instincts, if they ever existed, did pass away—that there was a period, probably an immense period as we reckon time in human history, when pre-historic men lived much as savages live now, without any important aids and helps.

The proofs of this are to be found in the great works of Sir John Lubbock and Mr. Tylor, of which I just now spoke. I can only bring out two of them here. First, it is plain that the first pre-historic men had the flint tools which the lowest savages use, and we can trace a regular improvement in the finish and in the

efficiency of their simple instruments corresponding to that which we see at this day in the upward transition from the lowest savages to the highest. Now it is not conceivable that a race of beings with valuable instincts supporting their existence and supplying their wants would need these simple tools. They are exactly those needed by very poor people who have no instincts, and those were used by such, for savages are the poorest of the poor. It would be very strange if these same utensils, no more no less, were used by beings whose discerning instincts made them in comparison altogether rich. Such a being would know how to manage without such things, or if it wanted any, would know how to make better.

And, secondly, on the moral side we know that the pre-historic age was one of much license, and the proof is that in that age descent was reckoned through the female only, just as it is among the lowest savages. "Maternity," it has been said, "is a matter of fact, paternity is a matter of opinion;" and this not very refined expression exactly conveys the connection of the lower human societies. In all slave-owning communities—in Rome formerly, and in Virginia yesterday—such was the accepted rule of law; the child kept the condition of the mother, whatever that condition was; nobody inquired as to the father; the law, once for all, assumed that he could not be ascertained. Of course no remains exist which prove this or anything else about the morality of pre-historic man; and morality can only be described by remains amounting to a history. But one of the axioms of pre-historic investigation binds us to accept this as the morality of the pre-historic races if we receive that axiom. It is plain that the wide-spread absence of a characteristic which greatly aids the possessor in the conflicts between race and race probably indicates that the primary race did not possess that quality. If one-armed people existed almost everywhere in every continent; if people were found in every intermediate stage, some with the mere germ of the second arm, some with the second arm, half-grown, some with it nearly complete; we should then argue—"the first race cannot have had two arms, because men have always been fighting, and as two arms are a great advantage in fighting, one-armed and half-armed people would immediately have been killed off the earth; they never could have attained any numbers. A diffused deficiency in a warlike power is the

best attainable evidence that the pre-historic men did not possess that power." If this axiom be received it is palpably applicable to the marriage-bond of primitive races. A cohesive "family" is the best germ for a campaigning nation. In a Roman family the boys, from the time of their birth, were bred to a domestic despotism, which well prepared them for a subjection in after life to a military discipline, a military drill, and a military despotism. They were ready to obey their generals because they were compelled to obey their fathers; they conquered the world in manhood because as children they were bred in homes where the tradition of passionate valor was steadied by the habit of implacable order. And nothing of this is possible in loosely-bound family groups (if they can be called families at all) where the father is more or less uncertain, where descent is not traced through him, where, that is, property does not come from him, where such property as he has passes to his sure relations—to his sister's children. An ill-knit nation which does not recognize paternity as a legal relation, would be conquered like a mob by any other nation which had a vestige or a beginning of the *patria potestas*. If, therefore, all the first men had the strict morality of families, they would no more have permitted the rise of semi-moral nations anywhere in the world than the Romans would have permitted them to arise in Italy. They would have conquered, killed, and plundered them before they became nations; and yet semi-moral nations exist all over the world.

It will be said that this argument proves too much. For it proves that not only the somewhat-before-history men, but the absolutely first men, could not have had close family instincts, and yet if they were like most though not all of the animals nearest to man they had such instincts. There is a great story of some African chief who expressed his disgust at adhering to one wife, by saying it was "like the monkeys." The semi-brutal ancestors of man, if they existed, had very likely an instinct of constancy which the African chief, and others like him, had lost. How, then, if it was so beneficial, could they ever lose it? The answer is plain: they could lose it if they had it as an irrational propensity and habit, and not as a moral and rational feeling. When reason came, it would weaken that habit like all other irrational habits. And reason is a force of such infinite vigor—a victory-making agent of such incomparable efficiency—that its

continually diminishing valuable instincts will not matter if it grows itself steadily all the while. The strongest competitor wins in both the cases we are imagining; in the first, a race with intelligent reason, but without blind instinct, beats a race with that instinct but without that reason; in the second, a race with reason and high moral feeling beats a race with reason but without high moral feeling. And the two are palpably consistent.

There is every reason, therefore, to suppose pre-historic man to be deficient in much of sexual morality, as we regard that morality. As to the detail of " primitive marriage " or " no marriage," for that is pretty much what it comes to, there is of course much room for discussion. Both Mr. M'Clennan and Sir John Lubbock are too accomplished reasoners and too careful investigators to wish conclusions so complex and refined as theirs to be accepted all in a mass, besides that on some critical points the two differ. But the main issue is not dependent on nice arguments. Upon broad grounds we may believe that in pre-historic times men fought both to gain and to keep their wives; that the strongest man took the best wife away from the weaker man; and that if the wife was restive, did not like the change, her new husband beat her; that (as in Australia now) a pretty woman was sure to undergo many such changes, and her back to bear the marks of many such chastisements; that in the principal department of human conduct (which is the most tangible and easily traced, and therefore the most obtainable specimen of the rest) the minds of pre-historic men were not so much immoral as unmoral: they did not violate a rule of conscience, but they were somehow not sufficiently developed for them to feel on this point any conscience, or for it to prescribe to them any rule.

The same argument applies to religion. There are, indeed, many points of the greatest obscurity, both in the present savage religions and in the scanty vestiges of pre-historic religion. But one point is clear. All savage religions are full of superstitions founded on luck. Savages believe that casual omens are a sign of coming events; that some trees are lucky, that some animals are lucky, that some places are lucky, that some indifferent actions —indifferent apparently and indifferent really—are lucky, and so of others in each class, that they are unlucky. Nor can a savage well distinguish between a sign of " luck " or ill-luck, as we should say, and a deity which causes the good or the ill; the in-

dicating precedent and the causing being are to the savage mind much the same; a steadiness of head far beyond savages is required consistently to distinguish them. And it is extremely natural that they should believe so. They are playing a game—the game of life—with no knowledge of its rules. They have not an idea of the laws of nature; if they want to cure a man, they have no conception at all of true scientific remedies. If they try anything they must try it upon bare chance. The most useful modern remedies were often discovered in this bare, empirical way. What could be more improbable—at least, for what could a prehistoric man have less given a good reason—than that some mineral springs should stop rheumatic pains, or mineral springs make wounds heal quickly? And yet the chance knowledge of the marvellous effect of gifted springs is probably as ancient as any sound knowledge as to medicine whatever. No doubt it was mere casual luck at first that tried these springs and found them answer. Somebody by accident tried them and by that accident was instantly cured. The chance which happily directed men in this one case, misdirected them in a thousand cases. Some expedition had answered when the resolution to undertake it was resolved on under an ancient tree, and accordingly that tree became lucky and sacred. Another expedition failed when a magpie crossed its path, and a magpie was said to be unlucky. A serpent crossed the path of another expedition, and it had a marvellous victory, and accordingly the serpent became a sign of great luck (and what a savage cannot distinguish from it—a potent deity which makes luck). Ancient medicine is equally unreasonable: as late down as the Middle Ages it was full of superstitions founded on mere luck. The collection of prescriptions published under the direction of the Master of the Rolls abounds in such fancies as we should call them. According to one of them, unless I forget, some disease—a fever, I think—is supposed to be cured by placing the patient between two halves of a hare and a pigeon recently killed.* Nothing can be plainer than

* Readers of Scott's life will remember that an admirer of his in humble life proposed to cure him of inflammation of the bowels by making him sleep a whole night on twelve smooth stones, painfully collected by the admirer from twelve brooks, which was, it appeared, a recipe of sovereign traditional power. Scott gravely told the proposer that he had mistaken the charm, and that the stones were of no virtue unless wrapped up in the petticoat of a widow who never wished to marry again, and as no such widow seems to have been forthcoming, he escaped the remedy.

that there is no ground for this kind of treatment, and that the idea of it arose out of a chance hit, which came right and succeeded. There was nothing so absurd or so contrary to common sense as we are apt to imagine about it. The lying between two halves of a hare or a pigeon was *à priori*, and to the inexperienced mind, quite as likely to cure disease as the drinking certain draughts of nasty mineral water. Both, somehow, were tried; both answered—that is, both were at the first time, or at some memorable time, followed by a remarkable recovery; and the only difference is, that the curative power of the mineral is persistent, and happens constantly; whereas, on an average of trials, the proximity of a hare or pigeon is found to have no effect, and cures take place as often in cases where it is not tried as in cases where it is. The nature of minds which are deeply engaged in watching events of which they do not know the reason, is to single out some fabulous accompaniment or some wonderful series of good luck or bad luck, and to dread ever after that accompaniment if it brings evil, and to love it and long for it if it brings good. All savages are in this position, and the fascinating effect of striking accompaniments (in some single case) of singular good fortune and singular calamity, is one great source of savage religions.

Gamblers to this day are, with respect to the chance part of their game, in much the same plight as savages with respect to the main events of their whole lives. And we well know how superstitious they all are. To this day very sensible whist-players have a certain belief—not, of course, a fixed conviction, but still a certain impression—that there is "luck under a black deuce," and will half mutter some not very gentle maledictions if they turn up as a trump the four of clubs, because it brings ill-luck, and is "the devil's bed-post." Of course grown-up gamblers have too much general knowledge, too much organized common sense, to prolong or cherish such ideas; they are ashamed of entertaining them, though, nevertheless, they cannot entirely drive them out of their minds. But child-gamblers—a number of little boys set to play loo—are just in the position of savages, for their fancy is still impressible, and they have not as yet been thoroughly subjected to the confuting experience of the real world; and child-gamblers have idolatries—at least I know that years ago a set of boy loo-players, of whom I was one, had con-

siderable faith in a certain "pretty fish," which was larger and more nicely made than the other fish we had. We gave the best evidence of our belief in its power to "bring luck;" we fought for it (if our elders were out of the way); we offered to buy it with many other fish from the envied holder, and I am sure I have often cried bitterly if the chance of the game took it away from me. Persons who stand up for the dignity of philosophy, if any such there still are, will say that I ought not to mention this, because it seems trivial; but the more modest spirit of modern thought plainly teaches, if it teaches anything, the cardinal value of occasional little facts. I do not hesitate to say that many learned and elaborate explanations of the totem—the "clan" deity—the beast or bird who in some supernatural way, attends to the clan and watches over it—do not seem to me to be nearly as akin to the reality as it works and lives among the lower races, as the "pretty fish" of my early boyhood. And very naturally so, for a grave philosopher is separated from primitive thought by the whole length of human culture; but an impressible child is as near to, and its thoughts are as much like, that thought as anything can now be.

The worst of these superstitions is that they are easy to make and hard to destroy. A single run of luck has made the fortune of many a charm and many idols. I doubt if even a single run of luck be necessary. I am sure that if an elder boy said that "the pretty fish was lucky—of course it was," all the lesser boys would believe it, and in a week it would be an accepted idol. And I suspect the Nestor of a savage tribe—the aged repository of guiding experience—would have an equal power of creating superstitions. But if once created they are most difficult to eradicate. If any one said that the amulet was of certain efficacy—that it always acted whenever it was applied—it would of course be very easy to disprove; but no one ever said that the "pretty fish" always brought luck; it was only said that it did so on the whole, and that if you had it you were more likely to be lucky than if you were without it. But it requires a long table of statistics of the results of games to disprove this thoroughly; and by the time people can make tables they are already above such beliefs, and do not need to have them disproved. Nor in many cases where omens or amulets are used would such tables be easy to make, for the data could not be found; and a rash at-

tempt to subdue the superstition by a striking instance may easily end in confirming it. Francis Newman, in the remarkable narrative of his experience as a missionary in Asia, gives a curious example of this. As he was setting out on a distant and somewhat hazardous expedition, his native servants tied round the neck of the mule a small bag supposed to be of preventive and mystic virtue. As the place was crowded and a whole townspeople looking on, Mr. Newman thought that he would take an opportunity of disproving the superstition. So he made a long speech of explanation in his best Arabic, and cut off the bag, to the horror of all about him. But as ill-fortune would have it, the mule had not got thirty yards up the street before she put her foot into a hole and broke her leg; upon which all the natives were confirmed in their former faith in the power of the bag, and said, " You see now what happens to unbelievers."

Now the present point as to these superstitions is their military inexpediency. A nation which was moved by these superstitions as to luck would be at the mercy of a nation, in other respects equal, which was not subject to them. In historical times, as we know, the panic terror at eclipses has been the ruin of the armies which have felt it; or has made them delay to do something necessary, or rush to do something destructive. The necessity of consulting the auspices, while it was sincerely practised and before it became a trick for disguising foresight, was in classical history very dangerous. And much worse is it with savages, whose life is one of omens, who must always consult their sorcerers, who may be turned this way or that by some chance accident, who, if they were intellectually able to frame a consistent military policy—and some savages in war see farther than in anything else—are yet liable to be put out, distracted, confused, and turned aside in the carrying out of it, because some event, really innocuous but to their minds foreboding, arrests and frightens them. A religion full of omens is a military misfortune, and will bring a nation to destruction if set to fight with a nation at all equal otherwise, who had a religion without omens. Clearly then, if all early men unanimously, or even much the greater number of early men, had a religion without omens, no religion, or scarcely a religion, anywhere in the world could have come into existence with omens; the immense majority possessing the superior military advantage, the small minority

destitute of it would have been crushed out and destroyed. But, on the contrary, all over the world religions with omens once existed, in most they still exist; all savages have them, and deep in the most ancient civilizations we find the plainest traces of them. Unquestionably therefore the pre-historic religion was like that of savages—viz., in this that it largely consisted in the watching of omens and in the worship of lucky beasts and things, which are a sort of embodied and permanent omens.

It may indeed be objected—an analogous objection was taken as to the ascertained moral deficiencies of pre-historic mankind—that if this religion of omens was so pernicious and so likely to ruin a race, no race would ever have acquired it. But it is only likely to ruin a race contending with another race otherwise equal. The fancied discovery of these omens—not an extravagant thing in an early age, as I have tried to show, not a whit then to be distinguished as improbable from the discovery of healing herbs or springs which pre-historic men also did discover—the discovery of omens was an act of reason as far as it went. And if in reason the omen-finding race were superior to the races in conflict with them, the omen-finding race would win, and we may conjecture that omen-finding races were thus superior since they won and prevailed in every latitude and in every zone.

In all particulars therefore we would keep to our formula, and say that pre-historic man was substantially a savage like present savages, in morals, intellectual attainments, and in religion; but that he differed in this from our present savages, that he had not had time to ingrain his nature so deeply with bad habits, and to impress bad beliefs so unalterably on his mind as they have. They have had ages to fix the stain on themselves, but primitive man was younger and had no such time.

I have elaborated the evidence for this conclusion at what may seem needless and tedious length, but I have done so on account of its importance. If we accept it, and if we are sure of it, it will help us to many most important conclusions. Some of these I have dwelt upon in previous papers, but I will set them down again.

First, it will in part explain to us what the world was about, so to speak, before history. It was making, so to say, the intellectual consistence—the connected and coherent habits, the preference

of equable to violent enjoyment, the abiding capacity to prefer, if required, the future to the present, the mental pre-requisites without which civilization could not begin to exist, and without which it would soon cease to exist even had it begun. The primitive man, like the present savage, had not these pre-requisites, but, unlike the present savage, he was capable of acquiring them and of being trained in them, for his nature was still soft and still impressible, and possibly, strange as it may seem to say, his outward circumstances were more favorable to an attainment of civilization than those of our present savages. At any rate, the pre-historic times were spent in making men capable of writing a history, and having something to put in it when it is written, and we can see how it was done.

Two preliminary processes indeed there are which seem inscrutable. There was some strange preliminary process by which the main races of men were formed; they began to exist very early, and except by intermixture no new ones have been formed since. It was a process singularly active in early ages, and singularly quiescent in later ages. Such differences as exist between the Aryan, the Turanian, the negro, the red man, and the Australian are differences greater altogether than any causes now active are capable of creating in present men, at least in any way explicable by us. And there is, therefore, a strong presumption that (as great authorities now hold) these differences were created before the nature of men, especially before the mind and the adaptive nature of men had taken their existing constitution. And a second condition precedent of civilization seems, at least to me, to have been equally inherited, if the doctrine of evolution be true, from some previous state or condition. I at least find it difficult to conceive of men, at all like the present men, unless existing in something like families, that is, in groups avowedly connected, at least on the mother's side, and probably always with a vestige of connection, more or less, on the father's side, and unless these groups were like many animals, gregarious, under a leader more or less fixed. It is almost beyond imagination how man, as we know man, could by any sort of process have gained this step in civilization. And it is a great advantage, to say the least of it, in the evolution theory that it enables us to remit this difficulty to a pre-existing period in nature, where other instincts and powers than our present ones may

perhaps have come into play, and where our imagination can hardly travel. At any rate, for the present I may assume these two steps in human progress made, and these two conditions realized.

The rest of the way, if we grant these two conditions, is plainer. The first thing is the erection of what we may call a custom-making power, that is, of an authority which can enforce a fixed rule of life, which, by means of that fixed rule, can in some degree create a calculable future, which can make it rational to postpone present violent but momentary pleasure for future continual pleasure, because it insures, what else is not sure, that if the sacrifice of what is in hand be made, enjoyment of the contingent expected recompense will be received. Of course I am not saying that we shall find in early society any authority of which these shall be the motives. We must have travelled ages (unless all our evidence be wrong) from the first men before there was a comprehension of such motives. I only mean that the first thing in early society was an authority of whose action this shall be the result, little as it knew what it was doing, little as it would have cared if it had known.

The conscious end of early societies was not at all, or scarcely at all, the protection of life and property, as it was assumed to be by the eighteenth-century theory of government. Even in early historical ages—in the youth of the human race, not its childhood—such is not the nature of early states. Sir Henry Maine has taught us that the earliest subject of jurisprudence is not the separate property of the individual, but the common property of the family group; what we should call private property hardly then existed; or if it did, was so small as to be of no importance: it was like the things little children are now allowed to call their own, which they feel it very hard to have taken from them, but which they have no real right to hold and keep. Such is our earliest property-law, and our earliest life-law is that the lives of all members of the family group were at the mercy of the head of the group. As far as the individual goes, neither his goods nor his existence were protected at all. And this may teach us that something else was lacked in early societies besides what in our societies we now think of.

I do not think I put this too high when I say that a most important if not the most important object of early legislation was

the enforcement of lucky rites. I do not like to say religious rites, because that would involve me in a great controversy as to the power, or even the existence, of early religions. But there is no savage tribe without a notion of luck; and perhaps there is hardly any which has not a conception of luck for the tribe as a tribe, of which each member has not some such a belief that his own action or the action of any other member of it—that he or the others doing anything which was unlucky or would bring a " curse "—might cause evil not only to himself, but to all the tribe as well. I have said so much about " luck " and about its naturalness before, that I ought to say nothing again. But I must add that the contagiousness of the idea of " luck " is remarkable. It does not at all, like the notion of desert, cleave to the doer. There are people to this day who would not permit in their house people to sit down thirteen to dinner. They do not expect any evil to themselves particularly for permitting it or sharing in it, but they cannot get out of their heads the idea that some one or more of the number will come to harm if the thing is done. This is what Mr. Tylor calls survival in culture. The faint belief in the corporate liability of these thirteen is the feeble relic and last dying representative of that great principle of corporate liability to good and ill fortune which has filled such an immense place in the world.

The traces of it are endless. You can hardly take up a book of travels in rude regions without finding " I wanted to do so and so. But I was not permitted, for the natives feared it might bring ill luck on the ' party,' or perhaps the tribe." Mr. Galton, for instance, could hardly feed his people. The Damaras, he says, have numberless superstitions about meat which are very troublesome. In the first place, each tribe, or rather family, is prohibited from eating cattle of certain colors, savages " who come from the sun " eschewing sheep spotted in a particular way, which those " who come from the rain " have no objection to. " As," he says, " there are five or six eandas or descents, and I had men from most of them with me, I could hardly kill a sheep that everybody would eat," and he could not keep his meat, for it had to be given away because it was commanded by one superstition, nor buy milk, the staple food of those parts, because it was prohibited by another. And so on without end. Doing anything unlucky is in their idea what putting on something that

attracts the electric fluid is in fact. You cannot be sure that harm will not be done, not only to the person in fault, but to those about him too. As in the Scriptural phrase, doing what is of evil omen is "like one that letteth out water." He cannot tell what are the consequences of his act, who will share them, or how they can be prevented.

In the earliest historical nations I need not say that the corporate liabilities of states is to a modern student their most curious feature. The belief is indeed raised far above the notion of mere "luck," because there is a distinct belief in gods or a god whom the act offends. But the indiscriminate character of the punishment still survives; not only the mutilator of the Hermæ, but all the Athenians—not only the violator of the rites of the *Bona dea*, but all the Romans—are liable to the curse engendered; and so all through ancient history. The strength of the corporate anxiety so created is known to every one. Not only was it greater than any anxiety about personal property, but it was immeasurably greater. Naturally, even reasonably we may say, it was greater. The dread of the powers of nature, or of the beings who rule those powers, is properly, upon grounds of reason, as much greater than any other dread as the might of the powers of nature is superior to that of any other powers. If a tribe or a nation have, by a contagious fancy, come to believe that the doing of any one thing by any number will be "unlucky," that is, will bring an intense and vast liability on them all, then that tribe and that nation will prevent the doing of that thing more than anything else. They will deal with the most cherished chief who even by chance should do it, as in a similar case the sailors dealt with Jonah.

I do not of course mean that this strange condition of mind as it seems to us was the sole source of early customs. On the contrary, man might be described as a custom-making animal with more justice than by many of the short descriptions. In whatever way a man has done anything once, he has a tendency to do it again: if he has done it several times he has a great tendency so to do it, and what is more, he has a great tendency to make others do it also. He transmits his formed customs to his children by example and by teaching. This is true now of human nature, and will always be true, no doubt. But what is peculiar in early societies is that over most of these customs

there grows sooner or later a semi-supernatural sanction. The whole community is possessed with the idea that if the primal usages of the tribe be broken, harm unspeakable will happen in ways you cannot think of, and from sources you cannot imagine. As people now-a-days believe that "murder will out," and that great crime will bring even an earthly punishment, so in early times people believed that for any breach of sacred custom certain retribution would happen. To this day many semi-civilized races have great difficulty in regarding any arrangement as binding and conclusive unless they can also manage to look at it as an inherited usage. Sir H. Maine, in his last work, gives a most curious case. The English Government in India has in many cases made new and great works of irrigation, of which no ancient Indian Government ever thought; and it has generally left it to the native village community to say what share each man of the village should have in the water; and the village authorities have accordingly laid down a series of most minute rules about it. But the peculiarity is that in no case do these rules "purport to emanate from the personal authority of their author or authors, which rests on grounds of reason, not on grounds of innocence and sanctity; nor do they assume to be dictated by a sense of equity; there is always, I am assured, a sort of fiction under which some customs as to the distribution of water are supposed to have emanated from a remote antiquity, although, in fact, no such artificial supply had ever been so much as thought of." So difficult does this ancient race—like, probably, in this respect so much of the ancient world—find it to imagine a rule which is obligatory, but not traditional.

The ready formation of custom-making groups in early society must have been greatly helped by the easy divisions of that society. Much of the world—all Europe, for example—was then covered by the primeval forest; men had only conquered, and as yet could only conquer, a few plots and corners from it. These narrow spaces were soon exhausted, and if numbers grew some of the new people must move. Accordingly migrations were constant, and were necessary. And these migrations were not like those of modern times. There was no such feeling as binds even Americans who hate, or speak as if they hated, the present political England—nevertheless to "the old home." There was then no organized means of communication—no practical com-

munication, we may say, between parted members of the same group; those who once went out from the parent society went out forever; they left no abiding remembrance, and they kept no abiding regard. Even the language of the parent tribe and of the descended tribe would differ in a generation or two. There being no written literature and no spoken intercourse, the speech of both would vary (the speech of such communities is always varying), and would vary in different directions. One set of causes, events, and associations would act on one, and another set on another; sectional differences would soon arise, and, for speaking purposes, what philologists call a dialectical difference often amounts to real and total difference: no connected interchange of thought is possible any longer. Separate groups soon "set up house;" the early societies begin a new set of customs, acquire and keep a distinct and special "luck."

If it were not for this facility of new formations, one good or bad custom would long since have "corrupted" the world; but even this would not have been enough but for those continual wars, of which I have spoken at such length in the essay on "The Use of Conflict," that I need say nothing now. These are by their incessant fractures of old images, and by their constant infusion of new elements, the real regenerators of society. And whatever be the truth or falsehood of the general dislike to mixed and half-bred races, no such suspicion was probably applicable to the early mixtures of primitive society. Supposing, as is likely, each great aboriginal race to have had its own quarter of the world (a quarter, as it would seem, corresponding to the special quarters in which plants and animals are divided), then the immense majority of the mixtures would be between men of different tribes but of the same stock, and this no one would object to, but everyone would praise.

In general, too, the conquerors would be better than the conquered (most merits in early society are more or less military merits), but they would not be very much better, for the lowest steps in the ladder of civilization are very steep, and the effort to mount them is slow and tedious. And this is probably the better if they are to produce a good and quick effect in civilizing those they have conquered. The experience of the English in India shows—if it shows anything—that a highly civilized race may fail in producing a rapidly excellent effect on a less civilized

race, because it is too good and too different. The two are not *en rapport* together; the merits of the one are not the merits prized by the other; the manner-language of the one is not the manner-language of the other. The higher being is not and cannot be a model for the lower; he could not mould himself on it if he would, and would not if he could. Consequently, the two races have long lived together, " near and yet far off," daily seeing one another and daily interchanging superficial thoughts, but in the depths of their mind separated by a whole era of civilization, and so affecting one another only a little in comparison with what might have been hoped. But in early societies there were no such great differences, and the rather superior conqueror must have easily improved the rather inferior conquered.

It is in the interior of these customary groups that national characters are formed. As I wrote a whole essay on the manner of this before, I cannot speak of it now. By proscribing nonconformist members for generations, and cherishing and rewarding conformist members, nonconformists become fewer and fewer, and conformists more and more. Most men mostly imitate what they see, and catch the tone of what they hear, and so a settled type—a persistent character—is formed. Nor is the process wholly mental. I cannot agree, though the greatest authorities say it, that no " unconscious selection " has been at work at the breed of man. If neither that nor conscious selection has been at work, how did there come to be these breeds, and such there are in the greatest numbers, though we call them nations? In societies tyrannically customary, uncongenial minds become first cowed, then melancholy, then out of health, and at last die. A Shelley in New England could hardly have lived, and a race of Shelleys would have been impossible. Mr. Galton wishes that breeds of men should be created by matching men with marked characteristics with women of like characteristics. But surely this is what nature has been doing time out of mind, and most in the rudest nations and hardest times. Nature disheartened in each generation the ill-fitted members of each customary group, so deprived them of their full vigor, or, if they were weakly, killed them. The Spartan character was formed because none but people with a Spartan make of mind could endure a Spartan existence. The early Roman character was so formed too. Perhaps all very marked national characters can be traced

back to a time of rigid and pervading discipline. In modern times, when society is more tolerant, new national characters are neither so strong, so featurely, nor so uniform.

In this manner society was occupied in pre-historic times,—it is consistent with and explicable by our general principle as to savages, that society should for ages have been so occupied, strange as that conclusion is, and incredible as it would be, if we had not been taught by experience to believe strange things.

Secondly, this principle and this conception of pre-historic times explain to us the meaning and the origin of the oldest and strangest of social anomalies—an anomaly which is among the first things history tells us—the existence of caste nations. Nothing is at first sight stranger than the aspect of those communities where several nations seem to be bound up together—where each is governed by its own rule of law, where no one pays any deference to the rule of law of any of the others. But if our principles be true, these are just the nations most likely to last, which would have a special advantage in early times, and would probably not only maintain themselves, but conquer and kill out others also. The characteristic necessity of early society as we have seen, is strict usage and binding coercive custom. But the obvious result and inevitable evil of that is monotony in society; no one can be much different from his fellows, or can cultivate his difference.

Such societies are necessarily weak from the want of variety in their elements. But a caste nation is various and composite; and has in a mode suited to early societies the constant co-operation of contrasted persons, which in a later age is one of the greatest triumphs of civilization. In a primitive age the division between the warrior caste and the priestly caste is especially advantageous. Little popular and little deserving to be popular now-a-days as are priestly hierarchies, most probably the beginnings of science were made in such, and were for ages transmitted in such. An intellectual class was in that age only possible when it was protected by a notion that whoever hurt them would certainly be punished by heaven. In this class apart discoveries were slowly made and some beginning of mental discipline was slowly matured. But such a community is necessarily unwarlike, and the superstition which protects priests from home murder will not aid them in conflict with the for-

eigner. Few nations mind killing their enemies' priests, and many priestly civilizations have perished without record before they well began. But such a civilization will not perish if a warrior caste is tacked on to it and is bound to defend it. On the contrary, such a civilization will be singularly likely to live. The head of the sage will help the arm of the soldier.

That a nation divided into castes must be a most difficult thing to found is plain. Probably it could only begin in a country several times conquered, and where the boundaries of each caste rudely coincided with the boundaries of certain sets of victors and vanquished. But, as we now see, when founded it is a likely nation to last. A parti-colored community of many tribes and many usages is more likely to get on, and help itself, than a nation of a single lineage and one monotonous rule. I say " at first," because I apprehend that in this case, as in so many others in the puzzling history of progress, the very institutions which most aid at step number one are precisely those which most impede at step number two. The whole of a caste nation is more various than the whole of a non-caste nation, but each caste itself is more monotonous than anything is, or can be, in a non-caste nation. Gradually a habit of action and type of mind forces itself on each caste, and it is little likely to be rid of it, for all who enter it are taught in one way and trained to the same employment. Several non-caste nations have still continued to progress. But all caste nations have stopped early, though some have lasted long. Each color in the singular composite of these tesselated societies has an indelible and invariable shade.

Thirdly, we see why so few nations have made rapid advance, and how many have become stationary. It is in the process of becoming a nation, and in order to become such, that they subjected themselves to the influence which has made them stationary. They could not become a real nation without binding themselves by a fixed law and usage, and it is the fixity of that law and usage which has kept them as they were ever since. I wrote a whole essay on this before, so I need say nothing now; and I only name it because it is one of the most important consequences of this view of society, if not indeed the most important.

Again, we can thus explain one of the most curious facts of the present world. " Manner," says a shrewd observer, who has seen much of existing life, " manner gets regularly worse as you

go from the East to the West; it is best in Asia, not so good in Europe, and altogether bad in the western states of America." And the reason is this—an imposing manner is a dignified usage, which tends to preserve itself and also all other existing usages along with itself. It tends to induce the obedience of mankind. One of the cleverest novelists of the present day has a curious dissertation to settle why on the hunting-field, and in all collections of men, some men " snub and some men get snubbed;" and why society recognizes in each case the ascendancy or the subordination as if it was right. " It is not at all," Mr. Trollope fully explains, " rare ability which gains the supremacy; very often the ill-treated man is quite as clever as the man who ill-treats him. Nor does it absolutely depend on wealth; for, though great wealth is almost always a protection from social ignominy, and will always insure a passive respect, it will not in a miscellaneous group of men of itself gain an active power to snub others. Schoolboys, in the same way," the novelist adds, " let some boys have dominion, and make other boys slaves." And he decides, no doubt truly, that in each case " something in the manner or gait " of the supreme boy or man has much to do with it. On this account in early society a dignified manner is of essential importance; it is, then, not only an auxiliary mode of acquiring respect, but a principal mode. The competing institutions which have now much superseded it, had not then begun. Ancient institutions or venerated laws did not then exist; and the habitual ascendancy of grave manner was a primary force in winning and calming mankind. To this day it is rare to find a savage chief without it; and almost always they greatly excel in it. Only last year a red Indian chief came from the prairies to see President Grant, and everybody declared that he had the best manners in Washington. The secretaries and heads of departments seemed vulgar to him; though, of course, intrinsically they were infinitely above him, for he was only " a plundering rascal." But an impressive manner had been a tradition in the societies in which he had lived, because it was of great value in those societies; and it is not a tradition in America, for nowhere is it less thought of, or of less use, than in a rough English colony; the essentials of civilization there depend on far different influences.

And manner, being so useful and so important, usages and customs grow up to develop it. Asiatic society is full of such things, if it should not rather be said to be composed of them.

" From the spirit and decision of a public envoy upon ceremonies and forms," says Sir John Malcolm, " the Persians very generally form their opinion of the character of the country he represents. This fact I had read in books, and all I saw convinced me of its truth. Fortunately the Elchee had resided at some of the principal courts of India, whose usages are very similar. He was, therefore, deeply versed in that important science denominated " Kâida-e-nishest-oo-berkhâst " (or the art of sitting and rising), in which is included a knowledge of the forms and manners of good society, and particularly those of Asiatic kings and their courts.

" He was quite aware, on his first arrival in Persia, of the consequence of every step he took on such delicate points; he was, therefore, anxious to fight all his battles regarding ceremonies before he came near the footstool of royalty. We were consequently plagued, from the moment we landed at Ambusheher, till we reached Shiraz, with daily, almost hourly, drilling, that we might be perfect in our demeanor at all places, and under all circumstances. We were carefully instructed where to ride in a procession, where to stand or sit within doors, when to rise from our seats, how far to advance to meet a visitor, and to what part of the tent or house we were to follow him when he departed, if he was of sufficient rank to make us stir a step.

" The regulations of our risings and standings, and movings and reseatings, were, however, of comparatively less importance than the time and manner of smoking our Kelliâns and taking our coffee. It is quite astonishing how much depends upon coffee and tobacco in Persia. Men are gratified or offended, according to the mode in which these favorite refreshments are offered. You welcome a visitor, or send him off, by the way in which you call for a pipe or a cup of coffee. Then you mark, in the most minute manner, every shade of attention and consideration, by the mode in which he is treated. If he be above you, you present these refreshments yourself, and do not partake till commanded; if equal, you exchange pipes, and present him with coffee, taking the next cup yourself; if a little below you, and you wish to pay him attention, you leave him to smoke his own pipe, but the servant gives him, according to your condescending nod, the first cup of coffee; if much inferior, you keep your distance and maintain your rank, by taking the first cup of coffee

yourself, and then directing the servant, by a wave of the hand, to help the guest.

"When a visitor arrives, the coffee and pipe are called for to welcome him; a second call for these articles announces that he may depart; but this part of the ceremony varies according to the relative rank or intimacy of the parties.

"These matters may appear light to those with whom observances of this character are habits, not rules; but in this country they are of primary consideration, a man's importance with himself and with others depending on them."

In ancient customary societies the influence of manner, which is a primary influence, has been settled into rules, so that it may aid established usages and not thwart them—that it may, above all, augment the habit of going by custom, and not break and weaken it. Every aid, as we have seen, was wanted to impose the yoke of custom upon such societies; and impressing the power of manner to serve them was one of the greatest aids.

And lastly, we now understand why order and civilization are so unstable even in progressive communities. We see frequently in states what physiologists call "Atavism"—the return, in part, to the unstable nature of their barbarous ancestors. Such scenes of cruelty and horror as happened in the great French Revolution, and as happen, more or less, in every great riot, have always been said to bring out a secret and suppressed side of human nature; and we now see that they were the outbreak of inherited passions long repressed by fixed custom, but starting into life as soon as that repression was catastrophically removed, and when sudden choice was given. The irritability of mankind, too, is only part of their imperfect, transitory civilization and of their original savage nature. They could not look steadily to a given end for an hour in their pre-historic state; and even now, when excited or when suddenly and wholly thrown out of their old grooves, they can scarcely do so. Even some very high races, as the French and the Irish, seem in troubled times hardly to be stable at all, but to be carried everywhere as the passions of the moment and the ideas generated at the hour may determine. But, thoroughly to deal with such phenomena as these, we must examine the mode in which national characters can be emancipated from the rule of custom, and can be prepared for the use of choice.

CHAPTER V

THE AGE OF DISCUSSION

Part I

THE greatest living contrast is between the old Eastern and customary civilizations and the new Western and changeable civilizations. A year or two ago an inquiry was made of our most intelligent officers in the East, not as to whether the English Government were really doing good in the East, but as to whether the natives of India themselves thought we were doing good; to which, in a majority of cases, the officers who were the best authority, answered thus: "No doubt you are giving the Indians many great benefits: you give them continued peace, free trade, the right to live as they like, subject to the laws; in these points and others they are far better off than they ever were; but still they cannot make you out. What puzzles them is your constant disposition to change, or as you call it, improvement. Their own life in every detail being regulated by ancient usage, they cannot comprehend a policy which is always bringing something new; they do not a bit believe that the desire to make them comfortable and happy is the root of it; they believe, on the contrary, that you are aiming at something which they do not understand—that you mean to 'take away their religion;' in a word, that the end and object of all these continual changes is to make Indians not what they are and what they like to be, but something new and different from what they are, and what they would not like to be." In the East, in a word, we are attempting to put new wine into old bottles—to pour what we can of a civilization whose spirit is progress into the form of a civilization whose spirit is fixity, and whether we shall succeed or not is perhaps the most interesting question in an age abounding almost beyond example in questions of political interest.

Historical inquiries show that the feeling of the Hindoos is the old feeling, and that the feeling of the Englishman is a modern feeling. "Old law rests," as Sir Henry Maine puts it, "not on contract but on status." The life of ancient civilization, so far as legal records go, runs back to a time when every important particular of life was settled by a usage which was social, political, and religious, as we should now say, all in one—which those who obeyed it could not have been able to analyze, for those distinctions had no place in their mind and language, but which they felt to be a usage of imperishable import, and above all things to be kept unchanged. In former papers I have shown, or at least tried to show, why these customary civilizations were the only ones which suited an early society; why, so to say, they alone could have been first; in what manner they had in their very structure a decisive advantage over all competitors. But now comes the further question: If fixity is an invariable ingredient in early civilizations, how then did any civilization become unfixed? No doubt most civilizations stuck where they first were; no doubt we see now why stagnation is the rule of the world, and why progress is the very rare exception; but we do not learn what it is which has caused progress in these few cases, or the absence of what it is which has denied it in all others.

To this question history gives a very clear and very remarkable answer. It is that the change from the age of status to the age of choice was first made in states where the government was to a great and a growing extent a government by discussion, and where the subjects of that discussion were in some degree abstract, or, as we should say, matters of principle. It was in the small republics of Greece and Italy that the chain of custom was first broken. "Liberty said, Let there be light, and, like a sunrise on the sea, Athens arose," says Shelley, and his historical philosophy is in this case far more correct than is usual with him. A free state—a state with liberty—means a state, call it republic or call it monarchy, in which the sovereign power is divided between many persons, and in which there is a discussion among those persons. Of these the Greek republics were the first in history, if not in time, and Athens was the greatest of those republics.

After the event it is easy to see why the teaching of history

should be this and nothing else. It is easy to see why the common discussion of common actions or common interests should become the root of change and progress. In early society, originality in life was forbidden and repressed by the fixed rule of life. It may not have been quite so much so in ancient Greece as in some other parts of the world. But it was very much so even there. As a recent writer has well said, " Law then presented itself to men's minds as something venerable and unchangeable, as old as the city; it had been delivered by the founder himself, when he laid the walls of the city, and kindled its sacred fire." An ordinary man who wished to strike out a new path, to begin a new and important practice by himself, would have been peremptorily required to abandon his novelties on pain of death; he was deviating, he would be told, from the ordinances imposed by the gods on his nation, and he must not do so to please himself. On the contrary, others were deeply interested in his actions. If he disobeyed, the gods might inflict grievous harm on all the people as well as him. Each partner in the most ancient kind of partnerships was supposed to have the power of attracting the wrath of the divinities on the entire firm, upon the other partners quite as much as upon himself. The quaking bystanders in a superstitious age would soon have slain an isolated bold man in the beginning of his innovations. What Macaulay so relied on as the incessant source of progress—the desire of man to better his condition—was not then permitted to work; man was required to live as his ancestors had lived.

Still further away from those times were the " free thought " and the " advancing sciences " of which we now hear so much. The first and most natural subject upon which human thought concerns itself is religion; the first wish of the half-emancipated thinker is to use his reason on the great problems of human destiny—to find out whence he came and whither he goes, to form for himself the most reasonable idea of God which he can form. But, as Mr. Grote happily said—" This is usually what ancient times would not let a man do. His *gens* or his *φρατρια* required him to believe as they believed." Toleration is of all ideas the most modern, because the notion that the bad religion of A cannot impair, here or hereafter, the welfare of B, is, strange to say, a modern idea. And the help of " science,"

at that stage of thought, is still more nugatory. Physical science, as we conceive it—that is, the systematic investigation of external nature in detail—did not then exist. A few isolated observations on surface things—a half-correct calendar, secrets mainly of priestly invention, and in priestly custody—were all that was then imagined; the idea of using a settled study of nature as a basis for the discovery of new instruments and new things, did not then exist. It is indeed a modern idea, and is peculiar to a few European countries even yet. In the most intellectual city of the ancient world, in its most intellectual age, Socrates, its most intellectual inhabitant, discouraged the study of physics because they engendered uncertainty, and did not augment human happiness. The kind of knowledge which is most connected with human progress now was that least connected with it then.

But a government by discussion, if it can be borne, at once breaks down the yoke of fixed custom. The idea of the two is inconsistent. As far as it goes, the mere putting up of a subject to discussion, with the object of being guided by that discussion, is a clear admission that that subject is in no degree settled by established rule, and that men are free to choose in it. It is an admission too that there is no sacred authority —no one transcendent and divinely appointed man whom in that matter the community is bound to obey. And if a single subject or group of subjects be once admitted to discussion, ere long the habit of discussion comes to be established, the sacred charm of use and wont to be dissolved. "Democracy," it has been said in modern times, "is like the grave; it takes, but it does not give." The same is true of "discussion." Once effectually submit a subject to that ordeal, and you can never withdraw it again; you can never again clothe it with mystery, or fence it by consecration; it remains forever open to free choice, and exposed to profane deliberation.

The only subjects which can be first submitted, or which till a very late age of civilization can be submitted to discussion in the community, are the questions involving the visible and pressing interests of the community; they are political questions of high and urgent import. If a nation has in any considerable degree gained the habit, and exhibited the capacity, to discuss these questions with freedom, and to decide them

with discretion, to argue much on politics and not to argue ruinously, an enormous advance in other kinds of civilization may confidently be predicted for it. And the reason is a plain deduction from the principles which we have found to guide early civilization. The first pre-historic men were passionate savages, with the greatest difficulty coerced into order and compressed into a state. For ages were spent in beginning that order and founding that state; the only sufficient and effectual agent in so doing was consecrated custom; but then that custom gathered over everything, arrested all onward progress, and stayed the originality of mankind. If, therefore, a nation is able to gain the benefit of custom without the evil—if after ages of waiting it can have order and choice together—at once the fatal clog is removed, and the ordinary springs of progress, as in a modern community we conceive them, begin their elastic action.

Discussion, too, has incentives to progress peculiar to itself. It gives a premium to intelligence. To set out the arguments required to determine political action with such force and effect that they really should determine it, is a high and great exertion of intellect. Of course, all such arguments are produced under conditions; the argument abstractedly best is not necessarily the winning argument. Political discussion must move those who have to act; it must be framed in the ideas, and be consonant with the precedent, of its time, just as it must speak its language. But within these marked conditions good discussion is better than bad; no people can bear a government of discussion for a day, which does not, within the boundaries of its prejudices and its ideas, prefer good reasoning to bad reasoning, sound argument to unsound. A prize for argumentative mind is given in free states, to which no other states have anything to compare.

Tolerance too is learned in discussion, and, as history shows, is only so learned. In all customary societies bigotry is the ruling principle. In rude places to this day any one who says anything new is looked on with suspicion, and is persecuted by opinion if not injured by penalty. One of the greatest pains to human nature is the pain of a new idea. It is, as common people say, so "upsetting;" it makes you think that, after all, your favorite notions may be wrong, your firmest beliefs ill-

founded; it is certain that till now there was no place allotted in your mind to the new and startling inhabitant, and now that it has conquered an entrance, you do not at once see which of your old ideas it will or will not turn out, with which of them it can be reconciled, and with which it is at essential enmity. Naturally, therefore, common men hate a new idea, and are disposed more or less to ill-treat the original man who brings it. Even nations with long habits of discussion are intolerant enough. In England, where there is on the whole probably a freer discussion of a greater number of subjects than ever was before in the world, we know how much power bigotry retains. But discussion, to be successful, requires tolerance. It fails wherever, as in a French political assembly, any one who hears anything which he dislikes tries to howl it down. If we know that a nation is capable of enduring continuous discussion, we know that it is capable of practising with equanimity continuous tolerance.

The power of a government by discussion as an instrument of elevation plainly depends—other things being equal—on the greatness or littleness of the things to be discussed. There are periods when great ideas are "in the air," and when, from some cause or other, even common persons seem to partake of an unusual elevation. The age of Elizabeth in England was conspicuously such a time. The new idea of the Reformation in religion, and the enlargement of the *mœnia mundi* by the discovery of new and singular lands, taken together, gave an impulse to thought which few, if any, ages can equal. The discussion, though not wholly free, was yet far freer than in the average of ages and countries. Accordingly, every pursuit seemed to start forward. Poetry, science, and architecture, different as they are, and removed as they all are at first sight from such an influence as discussion, were suddenly started onward. Macaulay would have said you might rightly read the power of discussion "in the poetry of Shakespeare, in the prose of Bacon, in the oriels of Longleat, and the stately pinnacles of Burleigh." This is, in truth, but another case of the principle of which I have had occasion to say so much as to the character of ages and countries. If any particular power is much prized in an age, those possessed of that power will be imitated; those deficient in that power will be despised. In

consequence an unusual quantity of that power will be developed, and be conspicuous. Within certain limits vigorous and elevated thought was respected in Elizabeth's time, and, therefore, vigorous and elevated thinkers were many; and the effect went far beyond the cause: It penetrated into physical science, for which very few men cared; and it began a reform in philosophy to which almost all were then opposed. In a word, the temper of the age encouraged originality, and in consequence original men started into prominence, went hither and thither where they liked, arrived at goals which the age never expected, and so made it ever memorable.

In this manner all the great movements of thought in ancient and modern times have been nearly connected in time with government by discussion. Athens, Rome, the Italian republics of the Middle Ages, the communes and states-general of feudal Europe, have all had a special and peculiar quickening influence, which they owed to their freedom, and which states without that freedom have never communicated. And it has been at the time of great epochs of thought—at the Peloponnesian war, at the fall of the Roman Republic, at the Reformation, at the French Revolution—that such liberty of speaking and thinking have produced their full effect.

It is on this account that the discussions of savage tribes have produced so little effect in emancipating those tribes from their despotic customs. The oratory of the North American Indian—the first savage whose peculiarities fixed themselves in the public imagination—has become celebrated, and yet the North American Indians were scarcely, if at all, better orators than many other savages. Almost all of the savages who have melted away before the Englishman were better speakers than he is. But the oratory of the savages has led to nothing, and was likely to lead to nothing. It is a discussion not of principles, but of undertakings; its topics are whether expedition A will answer, and should be undertaken; whether expedition B will not answer, and should not be undertaken; whether village A is the best village to plunder, or whether village B is a better. Such discussions augment the vigor of language, encourage a debating facility, and develop those gifts of demeanor and of gesture which excite the confidence of the hearers. But they do not excite the speculative intellect, do not

lead men to argue speculative doctrines, or to question ancient principles. They, in some material respects, improve the sheep within the fold; but they do not help them or incline them to leap out of the fold.

The next question, therefore, is, Why did discussions in some cases relate to prolific ideas, and why did discussions in other cases relate only to isolated transactions? The reply which history suggests is very clear and very remarkable. Some races of men at our earliest knowledge of them have already acquired the basis of a free constitution; they have already the rudiments of a complex polity—a monarch, a senate, and a general meeting of citizens. The Greeks were one of those races, and it happened, as was natural, that there was in process of time a struggle, the earliest that we know of, between the aristocratical party, originally represented by the Senate, and the popular party, represented by the "general meeting." This is plainly a question of principle, and its being so has led to its history being written more than two thousand years afterwards in a very remarkable manner. Some seventy years ago an English country gentleman named Mitford, who, like so many of his age, had been terrified into aristocratic opinions by the first French Revolution, suddenly found that the history of the Peloponnesian War was the reflex of his own time. He took up his Thucydides, and there he saw, as in a mirror, the progress and the struggles of his age. It required some freshness of mind to see this; at least, it had been hidden for many centuries. All the modern histories of Greece before Mitford had but the vaguest idea of it; and not being a man of supreme originality, he would doubtless have had very little idea of it either, except that the analogy of what he saw helped him by a telling object-lesson to the understanding of what he read. Just as in every country of Europe in 1793 there were two factions, one of the old-world aristocracy, and the other of the incoming democracy, just so there was in every city of ancient Greece, in the year 400 B.C., one party of the many and another of the few. This Mr. Mitford perceived, and being a strong aristocrat, he wrote a "history," which is little except a party pamphlet, and which, it must be said, is even now readable on that very account. The vigor of passion with which it was written puts life into the words, and retains the attention of

the reader. And that is not all. Mr. Grote, the great scholar whom we have had lately to mourn, also recognizing the identity between the struggles of Athens and Sparta and the struggles of our modern world, and taking violently the contrary side to that of Mitford, being as great a democrat as Mitford was an aristocrat, wrote a reply, far above Mitford's history in power and learning, but being in its main characteristic almost identical, being above all things a book of vigorous political passion, written for persons who care for politics, and not, as almost all histories of antiquity are and must be, the book of a man who cares for scholarship more than for anything else, written mainly, if not exclusively, for scholars. And the effect of fundamental political discussion was the same in ancient as in modern times. The whole customary ways of thought were at once shaken by it, and shaken not only in the closets of philosophers, but in the common thought and daily business of ordinary men. The "liberation of humanity," as Goethe used to call it—the deliverance of men from the yoke of inherited usage, and of rigid, unquestionable law—was begun in Greece, and had many of its greatest effects, good and evil, on Greece. It is just because of the analogy between the controversies of that time and those of our times that some one has said, "Classical history is a part of modern history; it is mediæval history only which is ancient."

If there had been no discussion of principle in Greece, probably she would still have produced works of art. Homer contains no such discussion. The speeches in the "Iliad," which Mr. Gladstone, the most competent of living judges, maintains to be the finest ever composed by man, are not discussions of principle. There is no more tendency in them to critical disquisition than there is to political economy. In Herodotus you have the beginning of the age of discussion. He belongs in his essence to the age which is going out. He refers with reverence to established ordinance and fixed religion. Still, in his travels through Greece, he must have heard endless political arguments; and accordingly you can find in his book many incipient traces of abstract political disquisition. The discourses on democracy, aristocracy, and monarchy, which he puts into the mouth of the Persian conspirators when the monarchy was vacant, have justly been called absurd, as

speeches supposed to have been spoken by those persons. No Asiatic ever thought of such things. You might as well imagine Saul or David speaking them as those to whom Herodotus attributes them. They are Greek speeches, full of free Greek discussion, and suggested by the experience, already considerable, of the Greeks in the results of discussion. The age of debate is beginning, and even Herodotus, the least of a wrangler of any man, and the most of a sweet and simple narrator, felt the effect. When we come to Thucydides, the results of discussion are as full as they have ever been; his light is pure, "dry light," free from the "humors" of habit, and purged from consecrated usage. As Grote's history often reads like a report to Parliament, so half Thucydides reads like a speech, or materials for a speech, in the Athenian Assembly. Of later times it is unnecessary to speak. Every page of Aristotle and Plato bears ample and indelible trace of the age of discussion in which they lived; and thought cannot possibly be freer. The deliverance of the speculative intellect from traditional and customary authority was altogether complete.

No doubt the "detachment" from prejudice, and the subjection to reason, which I ascribe to ancient Athens, only went down a very little way among the population of it. Two great classes of the people, the slaves and women, were almost excluded from such qualities; even the free population doubtless contained a far greater proportion of very ignorant and very superstitious persons than we are in the habit of imagining. We fix our attention on the best specimens of Athenian culture—on the books which have descended to us, and we forget that the corporate action of the Athenian people at various critical junctures exhibited the most gross superstition. Still, as far as the intellectual and cultivated part of society is concerned, the triumph of reason was complete; the minds of the highest philosophers were then as ready to obey evidence and reason as they have ever been since; probably they were more ready. The rule of custom over them at least had been wholly broken, and the primary conditions of intellectual progress were in that respect satisfied.

It may be said that I am giving too much weight to the classical idea of human development; that history contains the record of another progress as well; that in a certain sense

there was progress in Judæa as well as in Athens. And unquestionably there was progress, but it was only progress upon a single subject. If we except religion and omit also all that the Jews had learned from foreigners, it may be doubted if there be much else new between the time of Samuel and that of Malachi. In religion there was progress, but without it there was not any. This was due to the cause of that progress. All over antiquity, all over the East, and over other parts of the world which preserve more or less nearly their ancient condition, there are two classes of religious teachers—one, the priests, the inheritors of past accredited inspiration; the other, the prophet, the possessor of a like present inspiration. Curtius describes the distinction well in relation to the condition of Greece with which history first presents us:—

"The mantic art is an institution totally different from the priesthood. It is based on the belief that the gods are in constant proximity to men, and in their government of the world, which comprehends everything both great and small, will not disdain to manifest their will; nay, it seems necessary that, whenever any hitch has arisen in the moral system of the human world, this should also manifest itself by some sign in the world of nature, if only mortals are able to understand and avail themselves of these divine hints.

"For this a special capacity is requisite; not a capacity which can be learnt like a human art or science, but rather a peculiar state of grace in the case of single individuals and single families whose ears and eyes are opened to the divine revelations, and who participate more largely than the rest of mankind in the divine spirit. Accordingly it is their office and calling to assert themselves as organs of the divine will; they are justified in opposing their authority to every power of the world. On this head conflicts were unavoidable, and the reminiscences living in the Greek people, of the agency of a Tiresias and Calchas, prove how the Heroic kings experienced not only support and aid, but also opposition and violent protests, from the mouths of the men of prophecy."

In Judæa there was exactly the same opposition as elsewhere. All that is new comes from the prophets; all which is old is retained by the priests. But the peculiarity of Judæa—a peculiarity which I do not for a moment pretend that I can

explain—is that the prophetic revelations are, taken as a whole, indisputably improvements; that they contain, as time goes on, at each succeeding epoch, higher and better views of religion. But the peculiarity is not to my present purpose. My point is that there is no such spreading impetus in progress thus caused as there is in progress caused by discussion. To receive a particular conclusion upon the *ipse dixit*, upon the accepted authority of an admired instructor, is obviously not so vivifying to the argumentative and questioning intellect as to argue out conclusions for yourself. Accordingly the religious progress caused by the prophets did not break down that ancient code of authoritative usage. On the contrary, the two combined. In each generation the conservative influence "built the sepulchres" and accepted the teaching of past prophets, even while it was slaying and persecuting those who were living. But discussion and custom cannot be thus combined; their "method," as modern philosophers would say, is antagonistic. Accordingly, the progress of the classical states gradually awakened the whole intellect; that of Judæa was partial and improved religion only. And, therefore, in a history of intellectual progress, the classical fills the superior and the Jewish the inferior place; just as in a special history of theology only, the places of the two might be interchanged.

A second experiment has been tried on the same subject-matter. The characteristic of the Middle Ages may be approximately—though only approximately—described as a return to the period of authoritative usage and as the abandonment of the classical habit of independent and self-choosing thought. I do not for an instant mean that this is an exact description of the main mediæval characteristic; nor can I discuss how far that characteristic was an advance upon those of previous times; its friends say it is far better than the peculiarities of the classical period; its enemies that it is far worse. But both friends and enemies will admit that the most marked feature of the Middle Ages may roughly be described as I have described it. And my point is that just as this mediæval characteristic was that of a return to the essence of the customary epoch which had marked the pre-Athenian times, so it was dissolved much in the same manner as the influence of Athens, and other influences like it, claim to have dissolved that customary epoch.

The principal agent in breaking up the persistent mediæval customs, which were so fixed that they seemed likely to last forever, or till some historical catastrophe overwhelmed them, was the popular element in the ancient polity which was everywhere diffused in the Middle Ages. The Germanic tribes brought with them from their ancient dwelling-place a polity containing, like the classical, a king, a council, and a popular assembly; and wherever they went, they carried these elements and varied them, as force compelled or circumstances required. As far as England is concerned, the excellent dissertations of Mr. Freeman and Mr. Stubbs have proved this in the amplest manner, and brought it home to persons who cannot claim to possess much antiquarian learning. The history of the English Constitution, as far as the world cares for it, is, in fact, the complex history of the popular element in this ancient polity, which was sometimes weaker and sometimes stronger, but which has never died out, has commonly possessed great though varying power, and is now entirely predominant. The history of this growth is the history of the English people; and the discussions about this constitution and the discussions within it, the controversies as to its structure and the controversies as to its true effects, have mainly trained the English political intellect, in so far as it is trained. But in much of Europe, and in England particularly, the influence of religion has been very different from what it was in antiquity. It has been an influence of discussion. Since Luther's time there has been a conviction, more or less rooted, that a man may by an intellectual process think out a religion for himself, and that, as the highest of all duties, he ought to do so. The influence of the political discussion, and the influence of the religious discussion, have been so long and so firmly combined, and have so effectually enforced one another, that the old notions of loyalty, and fealty, and authority, as they existed in the Middle Ages, have now over the best minds almost no effect.

It is true that the influence of discussion is not the only force which has produced this vast effect. Both in ancient and in modern times other forces co-operated with it. Trade, for example, is obviously a force which has done much to bring men of different customs and different beliefs into close con-

tiguity, and has thus aided to change the customs and the beliefs of them all. Colonization is another such influence: it settles men among aborigines of alien race and usages, and it commonly compels the colonists not to be over-strict in the choice of their own elements; they are obliged to coalesce with and "adopt" useful bands and useful men, though their ancestral customs may not be identical, nay, though they may be, in fact, opposite to their own. In modern Europe, the existence of a cosmopolite Church, claiming to be above nations, and really extending through nations, and the scattered remains of Roman law and Roman civilization co-operated with the liberating influence of political discussion. And so did other causes also. But perhaps in no case have these subsidiary causes alone been able to generate intellectual freedom; certainly in all the most remarkable cases the influence of discussion has presided at the creation of that freedom, and has been active and dominant in it.

No doubt apparent cases of exception may easily be found. It may be said that in the Court of Augustus there was much general intellectual freedom, an almost entire detachment from ancient prejudice, but that there was no free political discussion at all. But, then, the ornaments of that time were derived from a time of great freedom: it was the republic which trained the men whom the empire ruled. The close congregation of most miscellaneous elements under the empire was, no doubt, of itself unfavorable to inherited prejudice, and favorable to intellectual exertion. Yet, except in the instance of the Church, which is a peculiar subject that requires a separate discussion, how little was added to what the republic left! The power of free interchange of ideas being wanting, the ideas themselves were barren. Also, no doubt, much intellectual freedom may emanate from countries of free political discussion, and penetrate to countries where that discussion is limited. Thus the intellectual freedom of France in the eighteenth century was in great part owing to the proximity of and incessant intercourse with England and Holland. Voltaire resided among us; and every page of the "Esprit des Lois" proves how much Montesquieu learned from living here. But, of course, it was only part of the French culture which was so derived: the germ might be foreign, but the tissue was native.

And very naturally, for it would be absurd to call the *ancien régime* a government without discussion: discussion abounded there, only, by reason of the bad form of the government, it was never sure with ease and certainty to affect political action. The despotism "tempered by epigram," was a government which permitted argument of licentious freedom within changing limits, and which was ruled by that argument spasmodically and practically, though not in name or consistently.

But though in the earliest and in the latest time government by discussion has been a principal organ for improving mankind, yet, from its origin, it is a plant of singular delicacy. At first the chances are much against its living. In the beginning, the members of a free state are of necessity few. The essence of it requires that discussion shall be brought home to those members. But in early time, when writing is difficult, reading rare, and representation undiscovered, those who are to be guided by the discussion must hear it with their own ears, must be brought face to face with the orator, and must feel his influence for themselves. The first free states were little towns, smaller than any political division which we now have, except the republic of Andorra, which is a sort of vestige of them. It is in the market-place of the country town, as we should now speak, and in petty matters concerning the market-town, that discussion began, and thither all the long train of its consequences may be traced back. Some historical inquirers, like myself, can hardly look at such a place without some sentimental musing, poor and trivial as the thing seems. But such small towns are very feeble. Numbers in the earliest wars, as in the latest, are a main source of victory. And in early times one kind of state is very common and is exceedingly numerous. In every quarter of the globe we find great populations compacted by traditional custom and consecrated sentiments, which are ruled by some soldier—generally some soldier of a foreign tribe, who has conquered them, and, as it has been said, "vaulted on the back" of them, or whose ancestors have done so. These great populations, ruled by a single will, have, doubtless, trodden down and destroyed innumerable little cities who were just beginning their freedom.

In this way the Greek cities in Asia were subjected to the Persian power, and so ought the cities in Greece proper to have

been subjected also. Every schoolboy must have felt that nothing but amazing folly and unmatched mismanagement saved Greece from conquest both in the time of Xerxes and in that of Darius. The fortunes of intellectual civilization were then at the mercy of what seems an insignificant probability. If the Persian leaders had only shown that decent skill and ordinary military prudence which it was likely they would show, Grecian freedom would have been at an end. Athens, like so many Ionian cities on the other side of the Ægean, would have been absorbed into a great despotism; all we now remember her for we should not remember, for it would never have occurred. Her citizens might have been ingenious and imitative and clever; they could not certainly have been free and original. Rome was preserved from subjection to a great empire by her fortunate distance from one. The early wars of Rome are with cities like Rome—about equal in size, though inferior in valor. It was only when she had conquered Italy that she began to measure herself against Asiatic despotisms. She became great enough to beat them before she advanced far enough to contend with them. But such great good fortune was and must be rare. Unnumbered little cities which might have rivalled Rome or Athens doubtless perished without a sign long before history was imagined. The small size and slight strength of early free states made them always liable to easy destruction.

And their internal frailty is even greater. As soon as discussion begins the savage propensities of men break forth; even in modern communities, where those propensities, too, have been weakened by ages of culture, and repressed by ages of obedience, as soon as a vital topic for discussion is well started the keenest and most violent passions break forth. Easily destroyed as are early free states by forces from without, they are even more liable to destruction by forces from within.

On this account such states are very rare in history. Upon the first view of the facts a speculation might even be set up that they were peculiar to a particular race. By far the most important free institutions, and the only ones which have left living representatives in the world, are the offspring either of the first constitutions of the classical nations or of the first constitutions of the Germanic nations. All living freedom runs

back to them, and those truths which at first sight would seem the whole of historical freedom, can be traced to them. And both the Germanic and the classical nations belong to what ethnologists call the Aryan race. Plausibly it might be argued that the power of forming free states was superior in and peculiar to that family of mankind. But unfortunately for this easy theory the facts are inconsistent with it. In the first place, all the so-called Aryan race certainly is not free. The Eastern Aryans—those, for example, who speak languages derived from the Sanscrit—are among the most slavish divisions of mankind. To offer the Bengalese a free constitution, and to expect them to work one, would be the maximum of human folly. There then must be something else besides Aryan descent which is necessary to fit men for discussion and train them for liberty; and, what is worse for the argument we are opposing, some non-Aryan races have been capable of freedom. Carthage, for example, was a Semitic republic. We do not know all the details of its constitution, but we know enough for our present purpose. We know that it was a government in which many proposers took part, and under which discussion was constant, active, and conclusive. No doubt Tyre, the parent city of Carthage, the other colonies of Tyre besides Carthage, and the colonies of Carthage, were all as free as Carthage. We have thus a whole group of ancient republics of non-Aryan race, and one which, being more ancient than the classical republics, could not have borrowed from or imitated them. So that the theory which would make government by discussion the exclusive patrimony of a single race of mankind is on the face of it untenable.

I am not prepared with any simple counter theory. I cannot profess to explain completely why a very small minimum of mankind were, as long as we know of them, possessed of a polity which as time went on suggested discussions of principle, and why the great majority of mankind had nothing like it. This is almost as hopeless as asking why Milton was a genius and why Bacon was a philosopher. Indeed it is the same, because the causes which give birth to the startling varieties of individual character, and those which give birth to similar varieties of national character, are, in fact, the same. I have, indeed, endeavored to show that a marked type of in-

dividual character once originating in a nation and once strongly preferred by it, is likely to be fixed on it and to be permanent in it, from causes which were stated. Granted the beginning of the type, we may, I think, explain its development and aggravation; but we cannot in the least explain why the incipient type of curious characters broke out, if I may so say, in one place rather than in another. Climate and "physical" surroundings, in the largest sense, have unquestionably much influence; they are one factor in the cause, but they are not the only factor; for we find most dissimilar races of men living in the same climate and affected by the same surroundings, and we have every reason to believe that those unlike races have so lived as neighbors for ages. The cause of types must be something outside the tribe acting on something within—something inherited by the tribe. But what that something is I do not know that anyone can in the least explain.

The following conditions may, I think, be historically traced to the nation capable of a polity which suggests principles for discussion, and so leads to progress. First, the nation must possess the *patria potestas* in some form so marked as to give family life distinctness and precision, and to make a home education and a home discipline probable and possible. While descent is traced only through the mother, and while the family is therefore a vague entity, no progress to a high polity is possible. Secondly, that polity would seem to have been created very gradually; by the aggregation of families into clans or *gentes*, and of clans into nations, and then again by the widening of nations, so as to include circumjacent outsiders, as well as the first compact and sacred group—the number of parties to a discussion was at first augmented very slowly. Thirdly, the number of "open" subjects—as we should say now-a-days—that is, of subjects on which public opinion was optional, and on which discussion was admitted, was at first very small. Custom ruled everything originally, and the area of free argument was enlarged but very slowly. If I am at all right, that area could only be enlarged thus slowly, for custom was in early days the cement of society, and if you suddenly questioned such custom you would destroy society. But though the existence of these conditions may be traced historically, and though the reason of them may be explained philosophically, they do not

completely solve the question why some nations have the polity and some not; on the contrary, they plainly leave a large "residual phenomenon" unexplained and unknown.

Part II

In this manner politics or discussion broke up the old bonds of custom which were now strangling mankind, though they had once aided and helped it. But this is only one of the many gifts which those polities have conferred, are conferring, and will confer to mankind. I am not going to write an eulogium on liberty, but I wish to set down three points which have not been sufficiently noticed.

Civilized ages inherit the human nature which was victorious in barbarous ages, and that nature is, in many respects, not at all suited to civilized circumstances. A main and principal excellence in the early times of the human races is the impulse to action. The problems before men are then plain and simple. The man who works hardest, the man who kills the most deer, the man who catches the most fish—even later on, the man who tends the largest herds, or the man who tills the largest field—is the man who succeeds; the nation which is quickest to kill its enemies, or which kills most of its enemies, is the nation which succeeds. All the inducements of early society tend to foster immediate action; all its penalties fall on the man who pauses; the traditional wisdom of those times was never weary of inculcating that "delays are dangerous," and that the sluggish man—the man "who roasteth not that which he took in hunting"—will not prosper on the earth, and, indeed, will very soon perish out of it. And in consequence an inability to stay quiet, an irritable desire to act directly, is one of the most conspicuous failings of mankind.

Pascal said that most of the evils of life arose from "man's being unable to sit still in a room"; and though I do not go that length, it is certain that we should have been a far wiser race than we are if we had been readier to sit quiet—we should have known much better the way in which it was best to act when we came to act. The rise of physical science, the first great body of practical truth provable to all men, exemplifies this in the plainest way. If it had not been for quiet people,

who sat still and studied the sections of the cone, if other quiet people had not sat still and studied the theory of infinitesimals, or other quiet people had not sat still and worked out the doctrine of chances, the most "dreamy moonshine," as the purely practical mind would consider, of all human pursuits; if "idle star-gazers" had not watched long and carefully the motions of the heavenly bodies—our modern astronomy would have been impossible, and without our astronomy "our ships, our colonies, our seamen," all which makes modern life, modern life could not have existed. Ages of sedentary, quiet, thinking people were required before that noisy existence began, and without those pale preliminary students it never could have been brought into being. And nine-tenths of modern science is in this respect the same: it is the produce of men whom their contemporaries thought dreamers—who were laughed at for caring for what did not concern them—who, as the proverb went, "walked into a well from looking at the stars"—who were believed to be useless, if anyone could be such. And the conclusion is plain that if there had been more such people, if the world had not laughed at those there were, if rather it had encouraged them, there would have been a great accumulation of proved science ages before there was. It was the irritable activity, the "wish to be doing something," that prevented it. Most men inherited a nature too eager and too restless to be quiet and find out things; and even worse—with their idle clamor they "disturbed the brooding hen," they would not let those be quiet who wished to be so, and out of whose calm thought much good might have come forth.

If we consider how much science has done and how much it is doing for mankind, and if the over-activity of men is proved to be the cause why science came so late into the world, and is so small and scanty still, that will convince most people that our over-activity is a very great evil. But this is only part, and perhaps not the greatest part of the harm that over-activity does. As I have said, it is inherited from times when life was simple, objects were plain, and quick action generally led to desirable ends. If A kills B before B kills A, then A survives, and the human race is a race of A's. But the issues of life are plain no longer. To act rightly in modern society requires a great deal of previous study, a great deal of assimilated

information, a great deal of sharpened imagination; and these pre-requisites of sound action require much time, and, I was going to say, much "lying in the sun," a long period of "mere passiveness." Even the art of killing one another, which at first particularly trained men to be quick, now requires them to be slow. A hasty general is the worst of generals now-a-days; the best is a sort of Von Moltke, who is passive if any man ever was passive; who is "silent in seven languages"; who possesses more and better accumulated information as to the best way of killing people than anyone who ever lived. This man plays a restrained and considerate game of chess with his enemy. I wish the art of benefiting men had kept pace with the art of destroying them; for though war has become slow, philanthropy has remained hasty. The most melancholy of human reflections, perhaps, is that, on the whole, it is a question whether the benevolence of mankind does most good or harm. Great good, no doubt, philanthropy does, but then it also does great evil. It augments so much vice, it multiplies so much suffering, it brings to life such great populations to suffer and to be vicious, that it is open to argument whether it be or be not an evil to the world, and this is entirely because excellent people fancy that they can do much by rapid action—that they will most benefit the world when they most relieve their own feelings; that as soon as an evil is seen "something" ought to be done to stay and prevent it. One may incline to hope that the balance of good over evil is in favor of benevolence; one can hardly bear to think that it is not so; but anyhow it is certain that there is a most heavy debit of evil, and that this burden might almost all have been spared us if philanthropists as well as others had not inherited from their barbarous forefathers a wild passion for instant action.

Even in commerce, which is now the main occupation of mankind, and one in which there is a ready test of success and failure wanting in many higher pursuits, the same disposition to excessive action is very apparent to careful observers. Part of every mania is caused by the impossibility to get people to confine themselves to the amount of business for which their capital is sufficient, and in which they can engage safely. In some degree, of course, this is caused by the wish to get rich; but in a considerable degree, too, by the mere love of activity.

There is a greater propensity to action in such men than they have the means of gratifying. Operations with their own capital will only occupy four hours of the day, and they wish to be active and to be industrious for eight hours, and so they are ruined. If they could only have sat idle the other four hours, they would have been rich men. The amusements of mankind, at least of the English part of mankind, teach the same lesson. Our shooting, our hunting, our travelling, our climbing have become laborious pursuits. It is a common saying abroad that "an Englishman's notion of a holiday is a fatiguing journey"; and this is only another way of saying that the immense energy and activity which have given us our place in the world have in many cases descended to those who do not find in modern life any mode of using that activity, and of venting that energy.

Even the abstract speculations of mankind bear conspicuous traces of the same excessive impulse. Every sort of philosophy has been systematized, and yet as these philosophies utterly contradict one another, most of them cannot be true. Unproved abstract principles without number have been eagerly caught up by sanguine men, and then carefully spun out into books and theories, which were to explain the whole world. But the world goes clear against these abstractions, and it must do so, as they require it to go in antagonistic directions. The mass of a system attracts the young and impresses the unwary; but cultivated people are very dubious about it. They are ready to receive hints and suggestions, and the smallest real truth is ever welcome. But a large book of deductive philosophy is much to be suspected. No doubt the deductions may be right; in most writers they are so; but where did the premises come from? Who is sure that they are the whole truth, and nothing but the truth, of the matter in hand? Who is not almost sure beforehand that they will contain a strange mixture of truth and error, and, therefore, that it will not be worth while to spend life in reasoning over their consequences. In a word, the superfluous energy of mankind has flowed over into philosophy, and has worked into big systems what should have been left as little suggestions.

And if the old systems of thought are not true as systems, neither is the new revolt from them to be trusted in its whole

vigor. There is the same original vice in that also. There is an excessive energy in revolutions if there is such energy anywhere. The passion for action is quite as ready to pull down as to build up; probably it is more ready, for the task is easier:

> "Old things need not be therefore true,
> O brother men, nor yet the new;
> Ah, still awhile the old thought retain,
> And yet consider it again."

But this is exactly what the human mind will not do. It will act somehow at once. It will not "consider it again."

But it will be said, What has government by discussion to do with these things? Will it prevent them, or even mitigate them? It can and does do both in the very plainest way. If you want to stop instant and immediate action, always make it a condition that the action shall not begin till a considerable number of persons have talked over it, and have agreed on it. If those persons be people of different temperaments, different ideas, and different educations, you have an almost infallible security that nothing, or almost nothing, will be done with excessive rapidity. Each kind of persons will have its spokesman; each spokesman will have his characteristic objection, and each his characteristic counter-proposition, and so in the end nothing will probably be done, or at least only the minimum which is plainly urgent. In many cases this delay may be dangerous; in many cases quick action will be preferable. A campaign, as Macaulay well says, cannot be directed by a "debating society"; and many other kinds of action also require a single and absolute general. But for the purpose now in hand—that of preventing hasty action, and insuring elaborate consideration—there is no device like a polity of discussion.

The enemies of this object—the people who want to act quickly—see this very distinctly. They are forever explaining that the present is "an age of committees," that the committees do nothing, that all evaporates in talk. Their great enemy is parliamentary government; they call it, after Mr. Carlyle, the "national palaver"; they add up the hours that are consumed in it, and the speeches which are made in it, and they sigh for a time when England might again be ruled, as it once

was, by a Cromwell—that is, when an eager, absolute man might do exactly what other eager men wished, and do it immediately. All these invectives are perpetual and many-sided; they come from philosophers, each of whom wants some new scheme tried; from philanthropists, who want some evil abated; from revolutionists, who want some old institution destroyed; from new eraists, who want their new era started forthwith. And they all are distinct admissions that a polity of discussion is the greatest hindrance to the inherited mistake of human nature, to the desire to act promptly, which in a simple age is so excellent, but which in a later and complex time leads to so much evil.

The same accusation against our age sometimes takes a more general form. It is alleged that our energies are diminishing; that ordinary and average men have not the quick determination now-a-days which they used to have when the world was younger; that not only do not committees and parliaments act with rapid decisiveness, but that no one now so acts. And I hope that in fact this is true, for according to me, it proves that the hereditary barbaric impulse is decaying and dying out. So far from thinking the quality attributed to us a defect, I wish that those who complain of it were far more right than I much fear they are. Still, certainly, eager and violent action is somewhat diminished, though only by a small fraction of what it ought to be. And I believe that this is in great part due, in England at least, to our government by discussion, which has fostered a general intellectual tone, a diffused disposition to weigh evidence, a conviction that much may be said on every side of everything which the elder and more fanatic ages of the world wanted. This is the real reason why our energies seem so much less than those of our fathers. When we have a definite end in view, which we know we want, and which we think we know how to obtain, we can act well enough. The campaigns of our soldiers are as energetic as any campaigns ever were; the speculations of our merchants have greater promptitude, greater audacity, greater vigor than any such speculations ever had before. In old times a few ideas got possession of men and communities, but this is happily now possible no longer. We see how incomplete these old ideas were; how almost by chance one seized on one nation,

and anotner on another; how often one set of men have persecuted another set for opinions on subjects of which neither, we now perceive, knew anything. It might be well if a greater number of effectual demonstrations existed among mankind; but while no such demonstrations exist, and while the evidence which completely convinces one man seems to another trifling and insufficient, let us recognize the plain position of inevitable doubt. Let us not be bigots with a doubt, and persecutors without a creed. We are beginning to see this, and we are railed at for so beginning. But it is a great benefit, and it is to the incessant prevalence of detective discussion that our doubts are due; and much of that discussion is due to the long existence of a government requiring constant debates, written and oral.

This is one of the unrecognized benefits of free government, one of the modes in which it counteracts the excessive inherited impulses of humanity. There is another also for which it does the same, but which I can only touch delicately, and which at first sight will seem ridiculous. The most successful races, other things being equal, are those which multiply the fastest. In the conflicts of mankind numbers have ever been a great power. The most numerous group has always had an advantage over the less numerous, and the fastest breeding group has always tended to be the most numerous. In consequence, human nature has descended into a comparatively uncontentious civilization, with a desire far in excess of what is needed; with a "felt want," as political economists would say, altogether greater than the "real want." A walk in London is all which is necessary to establish this. "The great sin of great cities" is one vast evil consequent upon it. And who is to reckon up how much these words mean? How many spoiled lives, how many broken hearts, how many wasted bodies, how many ruined minds, how much misery pretending to be gay, how much gaiety feeling itself to be miserable, how much after mental pain, how much eating and transmitted disease. And in the moral part of the world, how many minds are racked by incessant anxiety, how many thoughtful imaginations which might have left something to mankind are debased to mean cares, how much every successive generation sacrifices to the next, how little does any of them make of itself in com-

parison with what might be. And how many Irelands have there been in the world where men would have been contented and happy if they had only been fewer; how many more Irelands would there have been if the intrusive numbers had not been kept down by infanticide and vice and misery. How painful is the conclusion that it is dubious whether all the machines and inventions of mankind "have yet lightened the day's labor of a human being." They have enabled more people to exist, but these people work just as hard and are just as mean and miserable as the elder and the fewer.

But it will be said of this passion just as it was said of the passion of activity. Granted that it is in excess, how can you say, how on earth can anyone say, that government by discussion can in any way cure or diminish it? Cure this evil that government certainly will not; but tend to diminish it—I think it does and may. To show that I am not making premises to support a conclusion so abnormal, I will quote a passage from Mr. Spencer, the philosopher who has done most to illustrate this subject:—

"That future progress of civilization which the never-ceasing pressure of population must produce, will be accompanied by an enhanced cost of Individuation, both in structure and function; and more especially in nervous structure and function. The peaceful struggle for existence in societies ever growing more crowded and more complicated, must have for its concomitant an increase of the great nervous centres in mass, in complexity, in activity. The larger body of emotion needed as a fountain of energy for men who have to hold their places and rear their families under the intensifying competition of social life, is, other things equal, the correlative of larger brain. Those higher feelings presupposed by the better self-regulation which, in a better society, can alone enable the individual to leave a persistent posterity, are, other things equal, the correlatives of a more complex brain; as are also those more numerous, more varied, more general, and more abstract ideas, which must also become increasingly requisite for successful life as society advances. And the genesis of this larger quantity of feeling and thought in a brain thus augmented in size and developed in structure is, other things equal, the correlative of a greater wear of nervous tissue and

greater consumption of materials to repair it. So that both in original cost of construction and in subsequent cost of working, the nervous system must become a heavier tax on the organism. Already the brain of the civilized man is larger by nearly thirty per cent. than the brain of the savage. Already, too, it presents an increased heterogeneity—especially in the distribution of its convolutions. And further changes like these which have taken place under the discipline of civilized life, we infer will continue to take place. . . . But everywhere and always, evolution is antagonistic to procreative dissolution. Whether it be in greater growth of the organs which subserve self-maintenance, whether it be in their added complexity of structure, or whether it be in their higher activity, the abstraction of the required materials implies a diminished reserve of materials for race-maintenance. And we have seen reason to believe that this antagonism between Individuation and Genesis becomes unusually marked where the nervous system is concerned, because of the costliness of nervous structure and function. In § 346 was pointed out the apparent connection between high cerebral development and prolonged delay of sexual maturity; and in §§ 366, 367, the evidence went to show that where exceptional fertility exists there is sluggishness of mind, and that where there has been during education excessive expenditure in mental action, there frequently follows a complete or partial infertility. Hence the particular kind of further evolution which Man is hereafter to undergo is one which, more than any other, may be expected to cause a decline in his power of reproduction."

This means that men who have to live an intellectual life, or who can be induced to lead one, will be likely not to have so many children as they would otherwise have had. In particular cases this may not be true; such men may even have many children—they may be men in all ways of unusual power and vigor. But they will not have their maximum of posterity —will not have so many as they would have had if they had been careless or thoughtless men; and so, upon an average, the issue of such intellectualized men will be less numerous than those of the unintellectual.

Now, supposing this philosophical doctrine to be true—and the best philosophers, I think, believe it—its application to the

case in hand is plain. Nothing promotes intellect like intellectual discussion, and nothing promotes intellectual discussion so much as government by discussion. The perpetual atmosphere of intellectual inquiry acts powerfully, as everyone may see by looking about him in London, upon the constitution both of men and women. There is only a certain *quantum* of power in each of our race; if it goes in one way it is spent, and cannot go in another. The intellectual atmosphere abstracts strength to intellectual matters; it tends to divert that strength which the circumstances of early society directed to the multiplication of numbers; and as a polity of discussion tends, above all things, to produce an intellectual atmosphere, the two things which seemed so far off have been shown to be near, and free government has, in a second case, been shown to tend to cure an inherited excess of human nature.

Lastly, a polity of discussion not only tends to diminish our inherited defects, but also, in one case at least, to augment a heritable excellence. It tends to strengthen and increase a subtle quality or combination of qualities singularly useful in practical life—a quality which it is not easy to describe exactly, and the issues of which it would require not a remnant of an essay, but a whole essay to elucidate completely. This quality I call animated moderation.

If anyone were asked to describe what it is which distinguishes the writings of a man of genius who is also a great man of the world from all other writings, I think he would use these same words, "animated moderation." He would say that such writings are never slow, are never excessive, are never exaggerated; that they are always instinct with judgment, and yet that judgment is never a dull judgment; that they have as much spirit in them as would go to make a wild writer, and yet that every line of them is the product of a sane and sound writer. The best and almost perfect instance of this in English is Scott. Homer was perfect in it, as far as we can judge; Shakespeare is often perfect in it for long together, though then, from the defects of a bad education and a vicious age, all at once he loses himself in excesses. Still, Homer, and Shakespeare at his best, and Scott, though in other respects so unequal to them, have this remarkable quality in common—this union of life with measure, of spirit with reasonableness.

In action it is equally this quality in which the English—at least so I claim it for them—excel all other nations. There is an infinite deal to be laid against us, and as we are unpopular with most others, and as we are always grumbling at ourselves, there is no want of people to say it. But, after all, in a certain sense, England is a success in the world; her career has had many faults, but still it has been a fine and winning career upon the whole. And this on account of the exact possession of this particular quality. What is the making of a successful merchant? That he has plenty of energy, and yet that he does not go too far. And if you ask for a description of a great practical Englishman, you will be sure to have this, or something like it, "Oh, he has plenty of go in him; but he knows when to pull up." He may have all other defects in him; he may be coarse, he may be illiterate, he may be stupid to talk to; still this great union of spur and bridle, of energy and moderation, will remain to him. Probably he will hardly be able to explain why he stops when he does stop, or why he continued to move as long as he, in fact, moved; but still, as by a rough instinct, he pulls up pretty much where he should, though he was going at such a pace before.

There is no better example of this quality in English statesmen than Lord Palmerston. There are, of course, many most serious accusations to be made against him. The sort of homage with which he was regarded in the last years of his life has passed away; the spell is broken, and the magic cannot be again revived. We may think that his information was meagre, that his imagination was narrow, that his aims were short-sighted and faulty. But though we may often object to his objects, we rarely find much to criticise in his means. "He went," it has been said, "with a great swing"; but he never tumbled over; he always managed to pull up "before there was any danger." He was an odd man to have inherited Hampden's motto; still, in fact, there was a great trace in him of *mediocria firma*—as much, probably, as there could be in anyone of such great vivacity and buoyancy.

It is plain that this is a quality which as much as, if not more than, any other multiplies good results in practical life. It enables men to see what is good; it gives them intellect enough

for sufficient perception; but it does not make men all intellect; it does not "sickly them o'er with the pale cast of thought"; it enables them to do the good things they see to be good, as well as to see that they are good. And it is plain that a government by popular discussion tends to produce this quality. A strongly idiosyncratic mind, violently disposed to extremes of opinion, is soon weeded out of political life, and a bodiless thinker, an ineffectual scholar, cannot even live there for a day. A vigorous moderateness in mind and body is the rule of a polity which works by discussion; and, upon the whole, it is the kind of temper most suited to the active life of such a being as man in such a world as the present one.

These three great benefits of free government, though great, are entirely secondary to its continued usefulness in the mode in which it originally was useful. The first great benefit was the deliverance of mankind from the superannuated yoke of customary law, by the gradual development of an inquisitive originality. And it continues to produce that effect upon persons apparently far remote from its influence, and on subjects with which it has nothing to do. Thus Mr. Mundella, a most experienced and capable judge, tells us that the English artisan, though so much less sober, less instructed, and less refined than the artisans of some other countries, is yet more inventive than any other artisan. The master will get more good suggestions from him than from any other.

Again, upon plausible grounds—looking, for example, to the position of Locke and Newton in the science of the last century, and to that of Darwin in our own—it may be argued that there is some quality in English thought which makes them strike out as many, if not more, first-rate and original suggestions than nations of greater scientific culture and more diffused scientific interest. In both cases I believe the reason of the English originality to be that government by discussion quickens and enlivens thought all through society; that it makes people think no harm may come of thinking; that in England this force has long been operating, and so it has developed more of all kinds of people ready to use their mental energy in their own way, and not ready to use it in any other way, than a despotic government. And so rare is great

originality among mankind, and so great are its fruits, that this one benefit of free government probably outweighs what are in many cases its accessory evils. Of itself it justifies, or goes far to justify, our saying with Montesquieu, " Whatever be the cost of this glorious liberty, we must be content to pay it to heaven."

NIOBE AND HER DAUGHTER.

Photo-engraving from the original marble group in the Uffizi Gallery at Florence.

Niobe, according to the myth, was the wife of Amphion, King of Thebes, and the happy mother of seven sons and seven daughters. Her former playmate, Lato, was married to Jupiter, and when the worship of Lato was established in Thebes, Niobe, forgetting that she was only a mortal, drove in her chariot to the temple and commanded the Theban women not to join in the worship. Niobe also asserted that she was superior to Lato, who had but two children, while she had fourteen. Out of revenge Lato induced her son, Apollo, the god of the Silver Bow, and Diana, her daughter, famous as a huntress, to descend to earth and slay all the children of Niobe. In 1583 a large number of statues representing this subject were found in Rome. They were purchased by the Grand Duke of Tuscany, who placed them in the Villa Medici. In 1775 they were removed to the palace of the Uffizi in Florence. The group at present comprises fourteen statues. Niobe, clasping her youngest child, who has fled to her for protection, is the central figure. The group probably once adorned the pediment of a temple in Greece. It has never been decided whether the statues were the work of Scopas or Praxiteles or the work of some other sculptor in imitation of their respective styles. Nothing is known of the time when these specimens of art were transported from Greece.

CHAPTER VI

VERIFIABLE PROGRESS POLITICALLY CONSIDERED

THE original publication of these essays was interrupted by serious illness and by long consequent ill-health, and now that I am putting them together I wish to add another which shall shortly explain the main thread of the argument which they contain. In doing so there is a risk of tedious repetition, but on a subject both obscure and important any defect is better than an appearance of vagueness.

In a former essay I attempted to show that slighter causes than is commonly thought may change a nation from the stationary to the progressive state of civilization, and from the stationary to the degrading. Commonly the effect of the agent is looked on in the wrong way. It is considered as operating on every individual in the nation, and it is assumed, or half assumed, that it is only the effect which the agent directly produces on everyone that need be considered. But besides this diffused effect of the first impact of the cause, there is a second effect, always considerable, and commonly more potent—a new model in character is created for the nation; those characters which resemble it are encouraged and multiplied; those contrasted with it are persecuted and made fewer. In a generation or two, the look of the nation becomes quite different; the characteristic men who stand out are different, the men imitated are different; the result of the imitation is different. A lazy nation may be changed into an industrious, a rich into a poor, a religious into a profane, as if by magic, if any single cause, though slight, or any combination of causes, however subtle, is strong enough to change the favorite and detested types of character.

This principle will, I think, help us in trying to solve the question why so few nations have progressed, though to us progress seems so natural—what is the cause or set of causes which

have prevented that progress in the vast majority of cases, and produced it in the feeble minority. But there is a preliminary difficulty: What is progress, and what is decline? Even in the animal world there is no applicable rule accepted by physiologists, which settles what animals are higher or lower than others; there are controversies about it. Still more then in the more complex combinations and politics of human beings it is likely to be hard to find an agreed criterion for saying which nation is before another, or what age of a nation was marching forward and which was falling back. Archbishop Manning would have one rule of progress and decline; Professor Huxley, in most important points, quite an opposite rule; what one would set down as an advance the other would set down as a retreat. Each has a distinct end which he wishes and a distinct calamity which he fears, but the desire of the one is pretty near the fear of the other; books would not hold the controversy between them. Again, in art, who is to settle what is advance and what decline? Would Mr. Ruskin agree with anyone else on this subject, would he even agree with himself, or could any common inquirer venture to say whether he was right or wrong?

I am afraid that I must, as Sir William Hamilton used to say, "truncate a problem which I cannot solve." I must decline to sit in judgment on disputed points of art, morals, or religion. But without so doing I think there is such a thing as "verifiable progress," if we may say so; that is, progress which ninety-nine hundredths or more of mankind will admit to be such, against which there is no established or organized opposition creed, and the objectors to which, essentially varying in opinion themselves, and believing one one thing and another the reverse, may be safely and altogether rejected.

Let us consider in what a village of English colonists is superior to a tribe of Australian natives who roam about them. Indisputably in one, and that a main sense, they are superior. They can beat the Australians in war when they like; they can take from them anything they like, and kill any of them they choose. As a rule, in all the outlying and uncontested districts of the world, the aboriginal native lies at the mercy of the intruding European. Nor is this all. Indisputably in the English village there are more means of happiness, a greater accumulation of the instruments of enjoyment, than in the Australian tribe.

The English have all manner of books, utensils, and machines which the others do not use, value, or understand. And in addition, and beyond particular inventions, there is a general strength which is capable of being used in conquering a thousand difficulties, and is an abiding source of happiness, because those who possess it always feel that they can use it.

If we omit the higher but disputed topics of morals and religion, we shall find, I think, that the plainer and agreed-on superiorities of the Englishmen are these: first, that they have a greater command over the powers of nature upon the whole. Though they may fall short of individual Australians in certain feats of petty skill, though they may not throw the boomerang as well, or light a fire with earthsticks as well, yet on the whole, twenty Englishmen with their implements and skill can change the material world immeasureably more than twenty Australians and their machines. Secondly, that this power is not external only; it is also internal. The English not only possess better machines for moving nature, but are themselves better machines. Mr. Babbage taught us years ago that one great use of machinery was not to augment the force of man, but to register and regulate the power of man; and this in a thousand ways civilized man can do, and is ready to do, better and more precisely than the barbarian. Thirdly, civilized man not only has greater powers over nature, but knows better how to use them, and by better I here mean better for the health and comfort of his present body and mind. He can lay up for old age, which a savage having no durable means of sustenance cannot; he is ready to lay up because he can distinctly foresee the future, which the vague-minded savage cannot; he is mainly desirous of gentle, continuous pleasure, whereas the barbarian likes wild excitement, and longs for stupefying repletion. Much, if not all, of these three ways may be summed up in Mr. Spencer's phrase, that progress is an increase of adaptation of man to his environment, that is, of his internal powers and wishes to his external lot and life. Something of it too is expressed in the old pagan idea "*mens sana in corpore sano*." And I think this sort of progress may be fairly investigated quite separately, as it is progress in a sort of good everyone worth reckoning with admits and agrees in. No doubt there will remain people like the aged savage, who in his old age went back to his savage tribe and said that he had "tried

civilization for forty years, and it was not worth the trouble." But we need not take account of the mistaken ideas of unfit men and beaten races. On the whole the plainer sort of civilization, the simpler moral training, and the more elementary education are plain benefits. And though there may be doubt as to the edges of the conception yet there certainly is a broad road of " verifiable progress " which not only discoverers and admirers will like, but which all those who come upon it will use and value.

Unless some kind of abstraction like this is made in the subject the great problem " What causes progress? " will, I am confident, long remain unsolved. Unless we are content to solve simple problems first, the whole history of philosophy teaches that we shall never solve hard problems. This is the maxim of scientific humility so often insisted on by the highest inquirers that, in investigations, as in life, those " who exalt themselves shall be abased, and those who humble themselves shall be exalted; " and though we may seem mean only to look for the laws of plain comfort and simple present happiness, yet we must work out that simple case first, before we encounter the incredibly harder additional difficulties of the higher art, morals, and religion.

The difficulty of solving the problem even thus limited is exceedingly great. The most palpable facts are exactly the contrary to what we should expect. Lord Macaulay tells us that " In every experimental science there is a tendency towards perfection. In every human being there is a tendency to ameliorate his condition; " and these two principles operating everywhere and always, might well have been expected to " carry mankind rapidly forward." Indeed, taking verifiable progress in the sense which has just been given to it, we may say that nature gives a prize to every single step in it. Everyone that makes an invention that benefits himself or those around him, is likely to be more comfortable himself and to be more respected by those around him. To produce new things " serviceable to man's life and conducive to man's estate," is, we should say, likely to bring increased happiness to the producer. It often brings immense reward certainly now; a new form of good steel pen, a way of making some kind of clothes a little better or a little cheaper, have brought men great fortunes. And there is the same kind

of prize for industrial improvement in the earliest times as in the latest; though the benefits so obtainable in early society are poor indeed in comparison with those of advanced society. Nature is like a schoolmaster, at least in this, she gives her finest prizes to her high and most instructed classes. Still, even in the earliest society, nature helps those who can help themselves, and helps them very much.

All this should have made the progress of mankind—progress at least in this limited sense—exceedingly common; but, in fact, any progress is extremely rare. As a rule (and as has been insisted on before) a stationary state is by far the most frequent condition of man, as far as history describes that condition; the progressive state is only a rare and an occasional exception.

Before history began there must have been in the nation which writes it much progress; else there could have been no history. It is a great advance in civilization to be able to describe the common facts of life, and perhaps, if we were to examine it, we should find that it was at least an equal advance to wish to describe them. But very few races have made this step of progress; very few have been capable even of the meanest sort of history; and as for writing such a history as that of Thucydides, most nations could as soon have constructed a planet. When history begins to record, she finds most of the races incapable of history, arrested, unprogressive, and pretty much where they are now.

Why, then, have not the obvious and natural causes of progress (as we should call them) produced those obvious and natural effects? Why have the real fortunes of mankind been so different from the fortunes which we should expect? This is the problem which in various forms I have taken up in these papers, and this is the outline of the solution which I have attempted to propose.

The progress of man requires the co-operation of men for its development. That which any one man or any one family could invent for themselves is obviously exceedingly limited. And even if this were not true, isolated progress could never be traced. The rudest sort of co-operative society, the lowest tribe and the feeblest government, is so much stronger than isolated man, that isolated man (if he ever existed in any shape which could be called man), might very easily have ceased to exist. The first principle of the subject is that man can only make prog-

ress in "co-operative groups;" I might say tribes and nations, but I use the less common word because few people would at once see that tribes and nations are co-operative groups, and that it is their being so which makes their value; that unless you can make a strong co-operative bond, your society will be conquered and killed out by some other society which has such a bond; and the second principle is that the members of such a group should be similar enough to one another to co-operate easily and readily together. The co-operation in all such cases depends on a felt union of heart and spirit; and this is only felt when there is a great degree of real likeness in mind and feeling, however that likeness may have been attained.

This needful co-operation and this requisite likeness I believe to have been produced by one of the strongest yokes (as we should think if it were to be reimposed now) and the most terrible tyrannies ever known among men—the authority of "customary law." In its earlier stage this is no pleasant power—no "rose-water" authority, as Carlyle would have called it—but a stern, incessant, implacable rule. And the rule is often of most childish origin, beginning in a casual superstition or local accident. "These people," says Captain Palmer of the Fiji, "are very conservative. A chief was one day going over a mountain-path followed by a long string of his people, when he happened to stumble and fall; all the rest of the people immediately did the same except one man, who was set upon by the rest to know whether he considered himself better than the chief." What can be worse than a life regulated by that sort of obedience, and that sort of imitation? This is, of course, a bad specimen, but the nature of customary law as we everywhere find it in its earliest stages is that of coarse, casual, comprehensive usage, beginning, we cannot tell how, deciding, we cannot tell why, but ruling everyone in almost every action with an inflexible grasp.

The necessity of thus forming co-operative groups by fixed customs explains the necessity of isolation in early society. As a matter of fact all great nations have been prepared in privacy and in secret. They have been composed far away from all distraction. Greece, Rome, Judæa, were framed each by itself, and the antipathy of each to men of different race and different speech is one of their most marked peculiarities, and quite their strongest common property. And the instinct of early ages is a right

guide for the needs of early ages. Intercourse with foreigners then broke down in states the fixed rules which were forming their characters, so as to be a cause of weak fibre of mind, of desultory and unsettled action; the living spectacle of an admitted unbelief destroys the binding authority of religious custom and snaps the social cord.

Thus we see the use of a sort of "preliminary" age in societies, when trade is bad because it prevents the separation of nations, because it infuses distracting ideas among occupied communities, because it "brings alien minds to alien shores." And as the trade which we now think of as an incalculable good is in that age a formidable evil and destructive calamity; so war and conquest, which we commonly and justly see to be now evils, are in that age often singular benefits and great advantages. It is only by the competition of customs that bad customs can be eliminated and good customs multiplied. Conquest is the premium given by nature to those national characters which their national customs have made most fit to win in war, and in many most material respects those winning characters are really the best characters. The characters which do win in war are the characters which we should wish to win in war.

Similarly, the best institutions have a natural military advantage over bad institutions. The first great victory of civilization was the conquest of nations with ill-defined families having legal descent through the mother only, by nations of definite families tracing descent through the father as well as the mother, or through the father only. Such compact families are a much better basis for military discipline than the ill-bound families which indeed seem hardly to be families at all, where "paternity" is, for tribal purposes, an unrecognized idea, and where only the physical fact of "maternity" is thought to be certain enough to be the foundation of law or custom. The nations with a thoroughly compacted family system have "possessed the earth," that is, they have taken all the finest districts in the most competed-for parts; and the nations with loose systems have been merely left to mountain ranges and lonely islands. The family system and that in its highest form has been so exclusively the system of civilization that literature hardly recognizes any other, and that, if it were not for the living testimony of a great multitude of scattered communities which are "fashioned after the

structure of the elder world," we should hardly admit the possibility of something so contrary to all which we have lived amongst and which we have been used to think of. After such an example of the fragmentary nature of the evidence it is in comparison easy to believe that hundreds of strange institutions may have passed away and have left behind them not only no memorial, but not even a trace or a vestige to help the imagination to figure what they were.

I cannot expand the subject, but in the same way the better religions have had a great physical advantage, if I may say so, over the worse. They have given what I may call a confidence in the universe. The savage subjected to a mean superstition is afraid to walk simply about the world—he cannot do this because it is ominous, or he must do that because it is lucky, or he cannot do anything at all till the gods have spoken and given him leave to begin. But under the higher religions there is no similar slavery and no similar terror. The belief of the Greek

εἰς οἰωνος ἄριστος ἀμύνεσθαι περὶ πάτρης,

the belief of the Roman that he was to trust in the gods of Rome, for those gods are stronger than all others; the belief of Cromwell's soldiery that they were "to trust in God and keep their powder dry," are great steps in upward progress, using progress in its narrowest sense. They all enabled those who believed them "to take the world as it comes," to be guided by no unreal reason, and to be limited by no mystic scruple; whenever they found anything to do, to do it with their might. And more directly what I may call the fortifying religions, that is to say, those which lay the plainest stress on the manly parts of morality —upon valor, on truth and industry—have had plainly the most obvious effect in strengthening the races which believed them, and in making those races the winning races.

No doubt many sorts of primitive improvement are pernicious to war; an exquisite sense of beauty, a love of meditation, a tendency to cultivate the force of the mind at the expense of the force of the body, for example, help in their respective degrees to make men less warlike than they would otherwise be. But these are the virtues of other ages. The first work of the first ages is to bind men together in the strong bond of a rough, coarse, harsh custom; and the incessant conflict of nations ef-

fects this in the best way. Every nation is an "hereditary co-operative group," bound by a fixed custom; and out of those groups those conquer which have the most binding and most invigorating customs, and these are, as a rough rule, the best customs. The majority of the "groups" which win and conquer are better than the majority of those which fail and perish, and thus the first world grew better and was improved.

This early customary world no doubt continued for ages. The first history delineates great monarchies, each composed of a hundred customary groups, all of which believed themselves to be of enormous antiquity, and all of which must have existed for very many generations. The first historical world is not a new-looking thing but a very ancient, and according to principle it is necessary that it should exist for ages. If human nature was to be gradually improved, each generation must be born better tamed, more calm, more capable of civilization—in a word, more legal than the one before it, and such inherited improvements are always slow and dubious. Though a few gifted people may advance much, the mass of each generation can improve but very little on the generation which preceded it; and even the slight improvement so gained is liable to be destroyed by some mysterious atavism—some strange recurrence to a primitive past. Long ages of dreary monotony are the first facts in the history of human communities, but those ages were not lost to mankind, for it was then that was formed the comparatively gentle and guidable thing which we now call human nature.

And indeed the greatest difficulty is not in preserving such a world but in ending it. We have brought in the yoke of custom to improve the world, and in the world the custom sticks. In a thousand cases—in the great majority of cases—the progress of mankind has been arrested in this its earliest shape; it has been closely embalmed in a mummy-like imitation of its primitive existence. I have endeavored to show in what manner, and how slowly, and in how few cases this yoke of custom was removed. It was "government by discussion" which broke the bond of ages and set free the originality of mankind. Then, and then only, the motives which Lord Macaulay counted on to secure the progress of mankind, in fact, begin to work; then "the tendency in every man to ameliorate his condition" begins to be important, because then man can alter his condition while before

he is pegged down by ancient usage; then the tendency in each mechanical art towards perfection begins to have force, because the artist is at last allowed to seek perfection, after having been forced for ages to move in the straight furrow of the old fixed way.

As soon as this great step upwards is once made, all or almost all the higher gifts and graces of humanity have a rapid and a definite effect on " verifiable progress "—on progress in the narrowest, because in the most universally admitted sense of the term. Success in life, then, depends, as we have seen, more than anything else on " animated moderation," on a certain combination of energy of mind and balance of mind, hard to attain and harder to keep. And this subtle excellence is aided by all the finer graces of humanity. It is a matter of common observation that, though often separated, fine taste and fine judgment go very much together, and especially that a man with gross want of taste, though he may act sensibly and correctly for a while, is yet apt to break out, sooner or later, into gross practical error. In metaphysics, probably both taste and judgment involve what is termed " poise of mind," that is the power of true passiveness—the faculty of " waiting " till the stream of impressions, whether those of life or those of art, have done all that they have to do, and cut their full type plainly upon the mind. The ill-judging and the untasteful are both over-eager; both move too quick and blur the image. In this way the union between a subtle sense of beauty and a subtle discretion in conduct is a natural one, because it rests on the common possession of a fine power, though, in matter of fact, that union may be often disturbed. A complex sea of forces and passions troubles men in life and action, which in the calmer region of art are hardly to be felt at all. And, therefore, the cultivation of a fine taste tends to promote the function of a fine judgment, which is a main help in the complex world of civilized existence. Just so too the manner in which the more delicate parts of religion daily work in producing that " moderation " which, upon the whole, and as a rule, is essential to long success, defining success even in its most narrow and mundane way, might be worked out in a hundred cases, though it would not suit these pages. Many of the finer intellectual tastes have a similar restraining effect; they prevent, or tend to prevent, a greedy voracity after the good things of life, which

makes both men and nations in excessive haste to be rich and famous, often makes them do too much and do it ill, and so often leaves them at last without money and without respect.

But there is no need to expand this further. The principle is plain that, though these better and higher graces of humanity are impediments and encumbrances in the early fighting period, yet that in the later era they are among the greatest helps and benefits, and that as soon as governments by discussion have become strong enough to secure a stable existence, and as soon as they have broken the fixed rule of old custom, and have awakened the dormant inventiveness of men, then, for the first time, almost every part of human nature begins to spring forward, and begins to contribute its quota even to the narrowest, even to "verifiable" progress. And this is the true reason of all those panegyrics on liberty which are often so measured in expression but are in essence so true to life and nature. Liberty is the strengthening and developing power—the light and heat of political nature; and when some "Cæsarism" exhibits as it sometimes will an originality of mind, it is only because it has managed to make its own the products of past free times or neighboring free countries; and even that originality is only brief and frail, and after a little while, when tested by a generation or two, in time of need it falls away.

In a complete investigation of all the conditions of "verifiable progress," much else would have to be set out; for example, science has secrets of her own. Nature does not wear her most useful lessons on her sleeve; she only yields her most productive secrets, those which yield the most wealth and the most "fruit," to those who have gone through a long process of preliminary abstraction. To make a person really understand the "laws of motion" is not easy, and to solve even simple problems in abstract dynamics is to most people exceedingly hard. And yet it is on these out-of-the-way investigations, so to speak, that the art of navigation, all physical astronomy, and all the theory of physical movements at least depend. But no nation would beforehand have thought that in so curious a manner such great secrets were to be discovered. And many nations, therefore, which get on the wrong track, may be distanced—supposing there to be no communication—by some nation not better than any of them which happens to stumble on the right track. If

there were no " Bradshaw " and no one knew the time at which trains started, a man who caught the express would not be a wiser or a more business-like man than he who missed it, and yet he would arrive whole hours sooner at the capital both are going to. And unless I misread the matter, such was often the case with early knowledge. At any rate, before a complete theory of " verifiable progress " could be made, it would have to be settled whether this is so or not, and the conditions of the development of physical science would have to be fully stated; obviously you cannot explain the development of human comfort unless you know the way in which men learn and discover comfortable things. Then again, for a complete discussion, whether of progress or degradation, a whole course of analysis is necessary as to the effect of natural agencies on man, and of change in those agencies. But upon these I cannot touch; the only way to solve these great problems is to take them separately. I only profess to explain what seem to me the political pre-requisites of progress, and especially of early progress. I do this the rather because the subject is insufficiently examined, so that even if my views are found to be faulty, the discussion upon them may bring out others which are truer and better.

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